

NOVA SCOTIA COURT OF APPEAL

Citation: *Khalil v. Abdelkader*, 2024 NSCA 28

Date: 20240306

Docket: CA 526102

Registry: Halifax

Between:

Nermine Adel Khalil

Appellant

v.

Nashwa Abdelhamid Mohamed Abdelkader

Respondent

Judge: Bourgeois, J.A.

Motion Heard: February 22, 2024, in Halifax, Nova Scotia in Chambers

Held: Registrar's motion to dismiss granted

Counsel: Nermine Adel Khalil, the appellant, on her own behalf
Alex Smith and Charles White, for the respondent
Caroline McInnes, Registrar

Decision:

[1] On February 22, 2024, I heard a motion brought by Caroline McInnes, Registrar of the Court, for the dismissal of an appeal filed by Nermine Adel Khalil. In addition to hearing from the Registrar, I heard from the appellant, Ms. Khalil, and Mr. Smith and Mr. White, counsel on behalf of the respondent, Ms. Abdelkader.

[2] Ms. Khalil opposes the motion for dismissal and wants to continue with her appeal. She filed written submissions and an affidavit in support of her position. The respondent supports the Registrar's motion.

[3] At the conclusion of the hearing, I reserved my decision. For the reasons to follow, I would grant the Registrar's motion and dismiss the appeal.

Background

[4] The appellant seeks to challenge a decision rendered by the Honourable Justice Gail L. Gatchalian of the Supreme Court of Nova Scotia. That decision, granting summary judgment in favour of the respondent, was rendered orally on July 28, 2023 with written reasons being later released (2023 NSSC 245).

[5] The underlying action was brought by the respondent against the appellant, alleging defamation. In her written decision, Justice Gatchalian set out the law with respect to summary judgment and explained why there was no genuine issues of material fact or a question of law requiring determination. She granted summary judgment, awarded damages and issued an injunction preventing the appellant from publishing further defamatory statements about the respondent.

[6] The appellant filed a Notice of Appeal on August 16, 2023, in which she states:

The appellant appeals from the judgment dated July 28th, 2023, Supreme Court of Nova Scotia. I am appealing the whole decision made by the honourable justice Gail L. Gatchalian as I was at psychiatric hold and got released 9 days before the trial and I was unfit to stand a trial (refer to my psychiatrist) and didn't have an attorney and denied help from legal aid and didn't even know what I was accused of. Didn't even have the chance to defend myself nor translate evidence. The judge denied my rights for a fair trial.

[7] The appellant set out the following grounds of appeal:

- (1) judge bias and denied my right for a fair trial and discriminated my mental health disability accusing (*sic*) me to send threatening emails to my self and discriminating my race by writing former Egyptian.
- (2) a huge misunderstanding of evidence and accepted plaintiff fake evidence and wrongful admission of evidence while denied my right to talk and defend myself or hear my witnesses.
- (3) error in applying the law and miscarriage of justice.

[8] In her Notice of Appeal, the appellant asserted the authority for her appeal rested in various provisions of the *Criminal Code* and s. 15 of the *Canadian Charter of Rights and Freedoms*.

[9] On August 29, 2023, the Registrar sent a letter via e-mail to the appellant advising of the necessary steps she must undertake to advance the appeal. In particular, the appellant was directed:

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 August 17, 2023. That means that you must have your motion filed and heard no later than December 13, 2023.** 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*.

(Emphasis in original)

[10] The appellant acknowledged receipt of the Registrar's correspondence by email on August 29, 2023.

[11] The appellant did not file a motion for date and directions by December 13, 2023 as required by the *Civil Procedure Rules* and as directed by the Registrar.

[12] On January 30, 2024, the Registrar filed a Notice of Motion seeking dismissal of the appeal, with a scheduled hearing date of February 22, 2024. The appellant and the respondent were provided with the Notice of Motion and supporting memorandum filed by the Registrar via email on January 30, 2024, and by mail.

The Law

[13] As noted above, the Registrar's motion was brought pursuant to *Nova Scotia Civil Procedure Rule* 90.43(3) and (4). Rule 90.43 provides:

90.43 Appellant failing to perfect appeal

- (1) In this Rule 90.43 a "perfected appeal" means one in which the appellant has complied with the Rules as to each of the following:
 - (a) the form and service of the notice of appeal;
 - (b) applying for a date and directions in conformity with Rule 90.25;
 - (c) filing the certificate of readiness in conformity with Rule 90.26;
 - (d) the ordering of copies of the transcript of evidence, in compliance with Rule 90.29;
 - (e) filing and delivery of the appeal book and of the appellant's factum.
- (2) A respondent in an appeal not perfected by an appellant may make a motion to a judge to set down the appeal for hearing or, if five days notice is given to the respondent, to dismiss the appeal.
- (3) In an appeal not perfected before 80 days from the date of the filing of the notice of appeal, or before any other time ordered by a judge, the registrar must make a motion to a judge for an order to dismiss the appeal on five days notice to the parties.
- (4) A judge, on motion of a party or the registrar, may direct perfection of an appeal, set the appeal down for hearing, or, on five days notice to the parties, dismiss the appeal.

[14] Rule 90.43(3) places an obligation on the Registrar to monitor appeals filed with the Court and act when they have not been perfected. When a motion to dismiss is brought, Rule 90.43(4) provides a chambers judge with the discretion to provide further directions to move an appeal toward conclusion, or to grant a dismissal.

[15] In *Islam v. Sevgur*, 2011 NSCA 114, Justice Saunders summarized the principles governing a chambers judge's discretion to dismiss for failure to perfect the appeal. He wrote:

[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)

Analysis

[16] I will now proceed to consider the relevant factors as outlined above.

Reasonable excuse for the delay

[17] On February 16, 2024, the appellant filed an affidavit in which she asserts she had been suffering from bipolar and anxiety disorder, and invited the Court to call her physician to confirm. There was no medical information provided in support of this assertion. Although as a self-represented litigant the appellant may think the Court can endeavour to collect information about her from third parties, it cannot.

[18] In her affidavit, the appellant further asserted she has been homeless since August 31, 2023. She attached an Order of the Director of Residential Tenancies which showed her, as tenant, being required to provide vacant possession of a rental unit by that date.

[19] Although mental health challenges and housing instability may give rise to an excuse for failing to advance an appeal in a timely fashion in some contexts, with respect, I am not convinced this is such a case. The appellant has not, in my view, provided sufficient evidence in support of her claims. Further, the appellant made no attempt, despite being told of the deadline, to communicate with the Registrar that her personal circumstances were such she would be unable to meet the December 13th deadline. If she had, this factor may have weighed more in her favour.

Legitimate and arguable grounds of appeal

[20] I have set out earlier the appellant's grounds of appeal. From her submissions and the reference to sections of the *Criminal Code* in her Notice of Appeal, it appears she is under the mistaken belief she was prosecuted in a criminal proceeding. That is not the case. She was sued in a civil action for the tort of defamation. She filed a Statement of Defence. A motion for summary judgment brought by the respondent was granted.

[21] In her grounds of appeal the appellant asserts the motion judge made errors of fact and law. She provides no further specifics. Bare allegations do not meet the threshold of an arguable ground of appeal.

[22] The appellant further pleads judicial bias. This Court set out the law relating to such claims in *Green v. Green*, 2022 NSCA 83. There, Justice Van den Eynden wrote:

[41] In *Wewaykum Indian Band v. Canada*, 2003 SCC 45, the Supreme Court of Canada explained that the apprehension of bias must be a reasonable one:

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.”...

[42] As stated by this Court in *R. v. Potter; R. v. Colpitts*, 2020 NSCA 9 where there is a finding of a reasonable apprehension of bias, the offending judge's decision results in an error of law:

[753] If a reasonable apprehension of bias arises from, or an actual bias is found in, a judge's words or conduct, then the judge has exceeded his or her jurisdiction and erred in law.

[43] **The burden on a party claiming a reasonable apprehension of bias or actual bias on the part of a judge is onerous. There is a strong presumption of judicial impartiality that must be overcome by a claimant. The inquiry is also fact-specific and the claimant must present cogent evidence establishing serious grounds** (see *Wewaykum* at paras. 76-77 and *R. v. Teskey*, 2007 SCC 25 at para. 21).

(Emphasis added)

[23] A party advancing a ground of judicial bias has a high bar to meet. Other than her bare assertion of bias, the appellant has provided no further justification to demonstrate this ground is arguable.

[24] The appellant further argues she was denied procedural fairness in the court below by being precluded from calling witnesses and being denied an adjournment due to her precarious mental health. These are serious claims. A written transcript of the hearing before Justice Gatchalian was not provided by the appellant to support these submissions. To ascertain whether there could be an arguable ground of appeal in this regard, the recording of the hearing was reviewed. There is no indication the appellant asked for an adjournment of the motion due to mental health concerns or for the purpose of submitting further evidence.

[25] The appellant has failed to demonstrate she has legitimate and arguable grounds of appeal. In other words, her appeal lacks merit.

Prejudice

[26] This factor does not favour the appellant. The dismissal of a meritless appeal cannot cause prejudice to an appellant. However, permitting an appeal devoid of merit to continue, certainly is prejudicial to a respondent.

Court resources and the public purse

[27] In *LeBlanc v. LeBlanc*, 2023 NSCA 48, the impact on Court resources and the resulting cost to the public of allowing meritless appeals to be advanced was noted as follows:

[40] There is a cost associated with every appeal brought in this Court. This includes the time and effort of administrative staff in opening an appeal file and monitoring it to ensure compliance with the *Rules*. Meritless appeals take time away from other matters, and often occupy space on busy court dockets that could be used more effectively by other litigants with legitimate disputes requiring the Court's attention. Permitting Mrs. LeBlanc's appeal to continue would constitute an unjustified waste of valuable resources.

[28] I am of the view that the same applies in relation to the present matter.

Conclusion

[29] The appellant has failed to demonstrate the Registrar's motion ought to be denied and her appeal permitted to continue.

[30] For the reasons above, the Registrar's motion to dismiss the appeal is granted.

Bourgeois, J.A.