NOVA SCOTIA COURT OF APPEAL

Citation: *Dempsey v. Pagefreezer Software Inc.*, 2024 NSCA 53

Date: 20240514
Docket: CA 532047
Registry: Halifax

Between:

Nathan Kirk Dempsey

Appellant

v.

Pagefreezer Software Inc. and Michael Riedijk

Respondents

Corrected Decision: The text of this decision has been corrected as per the attached Erratum dated May 14, 2024.

Judge:	Bourgeois, J.A.
Motion Heard:	May 2, 2024, in Halifax, Nova Scotia in Chambers
Held:	Motion for stay dismissed; Motion for security for costs granted
Counsel:	Nathan Kirk Dempsey, on his own behalf Noah Entwistle, for the respondents

Decision:

[1] On May 2, 2024, I heard a number of motions brought by both the appellant, Mr. Dempsey, and the respondents. I reserved my decision in relation to two motions; specifically, a motion for a stay of a costs award granted by Justice Ann E. Smith, and the respondents' motion for security for costs.

[2] For the reasons below, I would dismiss the appellant's motion for a stay, and grant the respondents' motion for security for costs.

Background

[3] Both the appellant and the respondents have filed extensive materials which set out, from their differing perspectives, a complicated history between them. It is not necessary for the purposes of deciding the two motions, to engage in a detailed review of the background. Rather, the following summary will suffice:

- At one time, the appellant and the respondents were involved in a business relationship. That relationship was terminated and a settlement agreement reached between them. Following execution of the settlement agreement, in February 2022, the appellant filed a Petition in the British Columbia Supreme Court in which he sought to set aside the agreement and an order compelling the Canada Revenue Agency to conduct an investigation of the corporate respondent based on allegations of conspiracy and fraud. The Petition file was subject to a judicially ordered permanent sealing order;

- What followed was a series of orders from the Courts of British Columbia where monetary judgments were issued against the appellant, including fines arising from findings of contempt. The appellant was found to be a "vexatious litigant";

- The appellant attempted to challenge the judgments issued against him as well as the determination he had conducted himself in a vexatious manner. Ultimately, he sought leave to appeal the conclusions of the British Columbia Courts to the Supreme Court of Canada;

- On December 21, 2023, the appellant's leave application was dismissed. The appellant filed a Request for Reconsideration with the Supreme Court of Canada on January 10, 2024. The outcome of that request remains unresolved;

- Mr. Dempsey now resides in Nova Scotia. The respondents successfully sought to have two of the British Columbia judgments recognized in this Province by virtue of the *Enforcement of Canadian Judgments and Decrees Act*, S.N.S. 2001, c. 30 as amended. An Execution Order was issued by the Supreme Court of Nova Scotia on April 27, 2023;

- On June 9, 2023, the appellant filed a Notice of Motion in which he asked for the Execution Order to be stayed. That motion was heard and dismissed by Justice Peter Rosinski. His written reasons are reported as 2023 NSSC 240;

- The appellant filed a Notice of Appeal to this Court in which he sought to challenge Justice Rosinski's decision. The respondents successfully brought a motion for security for costs, and the appellant paid the sum of $2,500 into Court as ordered;

- The appellant's appeal was heard and dismissed by a panel of this Court on December 4, 2023. The Court ordered the appellant pay costs of $2,500 to the respondents;

- On December 14, 2023, the respondents filed in the Supreme Court of Nova Scotia, pursuant to the Enforcement of Canadian Judgments and Decrees Act, another judgment arising from proceedings in British Columbia. An Execution Order was subsequently issued on January 22, 2024, followed by a discovery subpoena in aid of execution on February 15, 2024;

- On March 7, 2024, the appellant brought a motion seeking to stay enforcement of the execution order and to set aside the discovery subpoena. The motion was heard on March 21, 2024 by Justice Ann E. Smith and dismissed with oral reasons the same day. The subsequent Order, issued April 3, 2024, provided that "Costs in the amount of

$1,500.00 are awarded to the Respondents, payable by the Applicant within ten (10) calendar days of this Order being issued"; and

- The appellant now challenges Justice Smith's decision. In his Notice of Appeal filed March 28, 2024, he sets out the claimed relief as follows:

> The Appellant seeks a reversal of the Oral Order, thereby granting the stay of execution, and the nullification of the discovery subpoena in aid of execution as originally sought in the Notice of Motion filed on March 7th, 2024.

Motion for a Stay

[4] On April 11, 2024, the appellant filed a motion seeking to stay the costs ordered by Justice Smith. The respondents oppose the motion. The appellant has not made payment to the respondents of the $1,500 ordered by Justice Smith; however, he has, on his own initiative, paid that sum into Court.

[5] As part of the stay motion, the appellant asks me to order that $1,000 of the costs he has paid into the Court be returned to him. The appellant argues Justice Smith should have only ordered a maximum of $500 in costs, and that further, she failed to recognize the British Columbia judgments were invalid. Additionally, she improperly relied upon the British Columbia court's flawed determination that he was a vexatious litigant.

[6] The respondents argue the motion for stay should be dismissed as the appellant has not met the required legal test. The respondents also submit that the appellant paying the $1,500 into Court should not be viewed as him being compliant with the costs order, but rather attempting to delay its enforcement. In short, the respondents assert the appellant is not acting in good faith.

[7] It is useful to review the legal principles that apply when this Court is requested to stay all or a portion of an order under appeal.

[8] The filing of a Notice of Appeal does not serve to stay the enforcement or execution of a judgment under appeal. Rather, an appellant seeking such relief is required to make a motion, pursuant to *Civil Procedure Rule* 90.41(2) which provides:

> **90.41 (2)** A judge of the Court of Appeal on application of a party to an appeal may, pending disposition of the appeal, order stayed the execution and enforcement of any

> judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[9] In *Colpitts v. Nova Scotia Barristers' Society*, 2019 NSCA 45, Justice Beveridge set out the considerations guiding a chamber judge's discretion to grant a stay as follows:

> [21] How this discretionary power should be exercised is guided principally by Justice Hallett's test set out in *Purdy v. Fulton Insurance Agencies Ltd.* (1990), 100 N.S.R. (2d) 341 (C.A.). The test has two parts.
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> [22] For the primary test, an applicant will be successful if the Court is satisfied on a balance of probabilities: an arguable issue is raised by the appeal; the appellant will suffer irreparable harm should the stay not be granted (assuming the appeal is ultimately successful); and, the appellant will suffer greater harm if the stay is not granted than the respondent if the stay is granted.
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> [23] The appellant may also obtain relief pending an appeal, even if it cannot meet all of the criteria for the primary test, if there are exceptional circumstances that nonetheless make it fit and just to grant a stay. This is known as the secondary test.

[10] To the above, I would add that the third factor, balance of convenience, only needs to be addressed if the appellant seeking a stay establishes the existence of arguable grounds and irreparable harm on a balance of probabilities. See *Reid v. Halifax Regional School Board*, 2006 NSCA 35 at para. 29.

[11] Further, with respect to exceptional circumstances, Saunders J.A. described the nature of the secondary test for a stay in *Armoyan v. Armoyan*, 2011 NSCA 92 as follows:

> [34] As to the secondary test, the appellant has failed to identify any circumstances which I would consider exceptional, or produce any evidence to support such an assertion. While the phrase "exceptional circumstances" can never be exhaustively defined, it has been interpreted by this Court to at least mean factors that would make it plainly unjust to refuse the stay. In other words, it is intended to catch the rare case when a court would wish to avoid a clear injustice in circumstances that did not meet the three requirements of the primary test.

[12] In his submissions in support of the motion for stay, the appellant focused heavily on what he views as the merits of the appeal. He asserts Justice Smith failed to consider the underlying orders the respondents are attempting to enforce in Nova Scotia are flawed, and her award of costs was improper. Although not

framed in terms of “an arguable issue”, I take it from his submissions the appellant asserts he meets that factor.

[13] I have concerns regarding the strength of the appellant’s arguments and the merits of the appeal. But even if I were to conclude the appellant has raised an arguable issue, he has provided no evidence that he would suffer irreparable harm should a stay not be granted. Nor, has he satisfied me the balance of convenience requires his motion be granted. The appellant has failed to meet the primary test for the granting of a stay.

[14] Further, there is nothing before me that would justify the granting of a stay on the basis of “exceptional circumstances”. The appellant has not demonstrated the failure to grant a stay, as requested, would result in a clear injustice.

[15] I decline to grant the stay as requested. To be clear, I further decline to order a return of the funds the Appellant has paid into Court.

[16] For further clarity, I am of the view the appellant has not complied with the costs ordered by Justice Smith by virtue of him paying $1,500 into Court. He was ordered to pay that sum to the respondents, and he has yet to do so.

Motion for Security for Costs

[17] On April 16, 2024, the respondents filed a Notice of Motion in which they sought an order requiring the appellant to pay security for costs in the amount of $7,500, as well as an order requiring him to pay the outstanding cost award of Justice Smith in the amount of $1,500 before being permitted to proceed with the appeal.

[18] Civil Procedure Rule 90.42 governs a motion for security for costs and provides:

> **90.42 Security for Costs**
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> **(1)** A judge of the Court of Appeal may, on motion of a party to an appeal, at any time order security for the costs of the appeal to be given as the judge considers just.

> **(2)** A judge of the Court of Appeal may, on motion of a party to an appeal, dismiss or allow the appeal if an appellant or a respondent fails to give security for costs when ordered.

[19] The relevant legal principles were recently reviewed by Chief Justice Wood in *Withenshaw v. Withenshaw*, 2022 NSCA 62. He noted:

> [6] An order to require an appellant to post security for costs is discretionary. The test applied by the Court places the onus on an applicant to establish "special circumstances" in order for the discretion to be exercised in their favour. Beveridge, JA described the approach to be taken in *Sable Mary Seismic Inc. v. Geophysical Services Inc.*, 2011 NSCA 40:
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>> [6] There are a variety of scenarios that may constitute "special circumstances". There is no need to list them. All bear on the issue of the degree of risk that if the appellant is unsuccessful the respondent will be unable to collect his costs on the appeal. In *Williams Lake Conservation Co. v. Kimberley-Lloyd Development Ltd.*, 2005 NSCA 44, Fichaud J.A. emphasized, merely a risk, without more, that an appellant may be unable to afford a costs award is insufficient to constitute "special circumstances". He wrote:
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>>> [11] Generally, a risk, without more, that the appellant may be unable to afford a costs award is insufficient to establish "special circumstances." It is usually necessary that there be evidence that, in the past, "the appellant has acted in an insolvent manner toward the respondent" which gives the respondent an objective basis to be concerned about his recovery of prospective appeal costs. The example which most often has appeared and supported an order for security is a past and continuing failure by the appellant to pay a costs award or to satisfy a money judgment: *Frost v. Herman*, at ¶ 9-10; *MacDonnell v. Campbell*, 2001 NSCA 123, at ¶ 4-5; *Leddicote*, at ¶ 15-16; White at ¶ 4-7; *Monette v. Jordan* (1997), 163 N.S.R. (2d) 75, at ¶ 7; *Smith v. Heron*, at ¶ 15-17; *Jessome v. Walsh* at ¶ 16-19.
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>> See also *Branch Tree Nursery & Landscaping Ltd. v. J & P Reid Developments Ltd.*, 2006 NSCA 131.
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>> [7] However, the demonstration of special circumstances does not equate to an automatic order of security for costs. It is a necessary condition that must be satisfied, but the court maintains a discretion not to make such an order, if the order would prevent a good faith appellant who is truly without resources from being able to prosecute an arguable appeal. This has sometimes been expressed as a need to be cautious before granting such an order lest a party be effectively denied their right to appeal merely as a result of impecuniosity (*2301072 Nova*

> *Scotia Ltd. v. Lienaux*, 2007 NSCA 28, at para. 6; *Smith v. Michelin North America (Canada) Inc.*, 2008 NSCA 52).

[20] The respondents assert an order requiring the appellant to pay funds into Court as security for costs on appeal is justified in the present circumstances. The affidavit filed in support of the motion demonstrate there are numerous judgments originally issued in British Columbia, and subsequently recognized in this Province, against the appellant, which remain unpaid. The respondents say this evidence demonstrates the appellant has “acted in an insolvent manner” towards them. Further, the appellant has also failed to pay the costs order of Justice Smith. The respondents assert $7,500 would represent an appropriate quantum of security.

[21] The appellant submits that security for costs is not warranted. He says he should not be considered to have “acted in an insolvent manner” because the judgments in question have been appealed to the Supreme Court of Canada and a final determination on their validity is still outstanding. He notes that his request to have the denial of leave reconsidered has been unreasonably delayed by federal employees at the Supreme Court of Canada.

[22] The appellant also argues that should security for costs be awarded, the quantum should be limited to $2,500, the same amount the respondents requested when making a similar motion in his appeal of the Rosinski decision. He argues there is no justification for the $7,500 now being requested.

[23] I am satisfied that an order requiring the appellant to post security for costs is warranted. Although I note the appellant has an outstanding request for a reconsideration of the Supreme Court’s denial of leave, there has been no stay granted in relation to the payment of the judgments he is appealing to that Court. The appellant has not made payment in relation to any of the judgments granted in favour of the respondents. I find that he has “acted in an insolvent manner” in relation to the respondents.

[24] As noted above, notwithstanding the above finding, I have a discretion to decline to order security for costs, notably if I find doing so would prevent an impecunious appellant from advancing a meritorious appeal. I have little information regarding the appellant’s financial circumstances. I note he was able to pay the security ordered by Justice Beaton in the amount of $2,500, and he recently was able to pay $1,500 into Court. I am unable to conclude that the appellant is impecunious, or there is any other reason why I should decline to award security for costs.

[25] I turn now to the quantum. I find it is appropriate to order the appellant to pay security for costs in the amount of $7,500. In doing so, I note:

- I am not bound by the quantum ordered by Beaton, J. in the motion brought in the earlier appeal;
- This second appeal also involves a motion brought by the appellant to introduce fresh evidence. He has already filed an affidavit in support of that motion in excess of 400 pages and indicated during his oral submissions he has another lengthy affidavit prepared that may also be filed;
- This appeal appears to involve substantially similar subject matter and arguments as were advanced in the prior appeal dismissed by this Court. If that is in fact found to be the case, it is likely the costs awarded in the event the appeal is dismissed, will be more substantial; and
- The respondents have been successful in relation to the two motions. It is highly likely that any costs awarded at the end of the appeal will factor in the cost consequences of the dismissal of the motion for a stay as well as the granting of the motion for security for costs.

Disposition

[26] In conclusion, the appellant's motion to stay Justice Smith's cost order of $1,500 is dismissed. As noted above, the cost consequences arising from the determination of this motion will be considered by the panel hearing the appeal.

[27] The respondents' motion for security for costs is granted. I direct that:

1. The appellant shall, on or before 4:30 p.m. (Atlantic time) on May 24, 2024, pay the sum of $7,500 into Court as security for costs in relation to the appeal;

2. The appellant shall, on or before 4:30 p.m. on May 24, 2024, pay the sum of $1,500 in compliance with the order of Justice Ann E. Smith. The appellant shall pay said sum to the respondents by delivering a certified cheque payable to

"McInnes Cooper in trust" to Suite 1300 – 1969 Upper Water Street, Halifax, Nova Scotia; and

3. In the event the appellant fails to make both payments as outlined above, an order dismissing the appeal will be issued forthwith.

Bourgeois, J.A.

NOVA SCOTIA COURT OF APPEAL

Citation: *Dempsey v. Pagefreezer Software Inc.*, 2024 NSCA 53

Date: 20240514
Docket: CA 532047
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Between:

Nathan Kirk Dempsey

Appellant

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Pagefreezer Software Inc. and Michael Riedijk

Respondents

ERRATUM

Revised judgment: The text of the original judgment has been corrected according to this erratum dated **May 14, 2024.**

Judge: Bourgeois, J.A.

Appeal Heard: May 2, 2024, in Halifax, Nova Scotia

Held: Motion for stay dismissed; Motion for security for costs granted

Counsel: Nathan Kirk Dempsey, on his own behalf
Noah Entwisle, for the respondents

Details: Paragraph 27 should be replaced with the following:

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