

NOVA SCOTIA COURT OF APPEAL
Citation: *Haince v. Wiseman*, 2016 NSCA 92

Date: 20161220
Docket: CA 458273
Registry: Halifax

Between:

Yvan Haince

Appellant

v.

Marion P. Wiseman and Dawn Rae Downton

Respondents

Judge: Beveridge J.A.

Motion Heard: December 15, 2016, in Halifax, Nova Scotia

Held: Motion dismissed

Counsel: Yvan Haince, appellant in person
Philip Whitehead, for the respondents

Reasons for judgment:

[1] I do not have all of the details of the dispute between Mr. Haince and the proposed respondents, Marion Wiseman and Dawn Downton.

[2] What is obvious is that Yvan Haince is a contractor. He filed a builders' lien, and later started an action in the Nova Scotia Supreme Court. He had counsel. Ms. Wiseman and Ms. Downton defended and filed a counter-claim.

[3] In due course Ms. Wisemen and Ms. Downton applied to have the lien vacated, and required Mr. Haince to post security for costs. At some point in the proceedings, Mr. Haince became self-represented.

[4] The Honourable Justice Glen G. McDougall heard the applications on October 26, 2016. He granted both, and made modest costs awards against Mr. Haince of \$150.00 and \$100.00. Justice McDougall's reasons are unreported. Orders were duly taken out on October 31, 2016.

[5] The October 31 orders are interlocutory. They did not dispose of the main or real dispute between the parties. That is still to be resolved.

[6] An application for leave to appeal is required to challenge an interlocutory order. It must be filed and served within 10 days. Mr. Haince did not do so. The only information in the file about when Mr. Haince was in touch with Court Administration about an appeal is an email from the Registrar to Mr. Haince dated November 28, 2016 directing him where to find forms and materials to make a motion for an extension of time to bring an application for leave to appeal.

[7] Mr. Haince's motion materials are his Notice of Motion and Affidavit, both dated December 7, 2016. Attached to his Affidavit was his proposed Application for Leave to Appeal. I will set out some of the content of his Affidavit later.

[8] The respondents oppose the motion. Mr. Whitehead's brief argues that there is no adequate explanation for the delay in proceeding with the appeal, and the grounds of appeal set out in Mr. Haince's proposed Notice of Application for Leave to Appeal fail to identify any real grounds that might attract appellate intervention.

[9] A judge has a discretion to extend the time to permit filing appeal documents outside the times set by statute and the *Nova Scotia Civil Procedure Rules*. I will

briefly set out the principles that guide the exercise of this discretion and then apply them.

THE PRINCIPLES

[10] *Nova Scotia Civil Procedure Rule 90.37(12)* simply says that a judge may extend or abridge any time limits referred to *Rule 90*. It cannot be gainsaid that there can be a wide variety of circumstances surrounding a failure by party to meet the time limits to appeal. Because of this, there is no rigid or bright line rule; instead, the question is whether the interests of justice require the application to be granted.

[11] What factors inform the answer was summarized in *Farrell v. Casavant*, 2010 NSCA 71:

[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.

See also: *Cummings v. Nova Scotia (Minister of Community Services)*, 2011 NSCA 2; *McCully v. Rogers Estate*, 2013 NSCA 22; *Deveau v. Fawson Estate*, 2013 NSCA 54; *Wadden v. BMO Nesbitt Burns*, 2014 NSCA 45; *Tupper v. Nova Scotia Barristers' Society*, 2014 NSCA 90, para. 22; *Cormier v. Graham*, 2015 NSCA 17; *Marshall v. Robbins*, 2016 NSCA 51 at para. 22, leave to appeal refused, [2016] S.C.C.A. No. 405).

APPLICATION

[12] The burden is on the applicant to persuade me that the interests of justice require an extension of time to file his proposed Application for Leave to Appeal. He has failed to do so. The following reasons explain.

[13] Mr. Haince's affidavit of December 7, 2016 contains the following:

2. I understand that the purpose of this Affidavit is to provide the Court with an accurate, complete and truthful explanation for my failure to meet the time deadline under the Rules, and also to describe my reasons for seeking the court's permission to proceed with my appeal.

[. . .]

6. I have attached to this Affidavit as Exhibit "A" the proposed Notice of Appeal I wish to [sic] if the Court permits me to do so. It fully describes the mistakes I say occurred in the court.
7. I hereby confirm that I have a genuine intention to appeal and that I first formed such an intention on the 28th day of October, 2016.
8. I was not able to file my Notice of Appeal within the deadline provided in Civil Procedure Rule 90.13 or 91.05 for the following reasons:
9. My understanding of Judge McDougal's ruling on October 26, 2016 was that it was over in the Supreme Court but I could pursue my matter in small claims court.
10. Upon receipt of Mr. Whiteheads e-mail I contacted small claims court and was told that no proceeding could be done while active in the Supreme Court.
11. On that date I decided to appeal Judge McDougal's ruling and went to CPR 90.06 and prepared my appeal and delivered it to the court house within its time frame.

[14] I find Mr. Haince's explanation confusing and unsatisfactory. He swears that he first formed an intention to appeal on October 28, 2016. However, in his subsequent paragraphs where he sets out why he was not able to file his appeal documents on time, he says he understood that Justice McDougall's ruling of October 26 made his Supreme Court proceedings over, but he could pursue his claim in Small Claims Court.

[15] At a later undisclosed date, he adds that he received an email from Mr. Whitehead that led him to contact Small Claims Court only to learn that he could not litigate there while his claim in Supreme Court was still active. It was on this date that he decided to try to appeal, but found himself out of time. I am not satisfied that he had a good faith intention to appeal within the ten-day time limit prescribed for interlocutory decisions.

[16] Even if he had such an intention, the interests of justice would still not require the extension. The orders of October 31, 2016 do not bar his access to

having his claim litigated. He completely fails to identify any prejudice arising from those orders or articulate realistic grounds of appeal that could attract appellate intervention.

[17] The proposed Notice of Application for Leave to Appeal did not specify whether Mr. Haince wanted to appeal one or both interlocutory orders. On December 15, 2016, he clarified: he wants to challenge both, if I were to grant an extension of time to file.

[18] One order is for security for costs. He does not say he cannot post the required amount. There is nothing in the proposed grounds of appeal that suggests any kind of error by Justice McDougall in making that discretionary order.

[19] As to the order to vacate the lien, Mr. Haince's affidavit says: "Under the builders lien act a contractor's only protection after credit has been provided is security of the lien" (para. 17). A lien is an important device to help protect contractors from non-payment by owners. But it is not the only protection. With or without the lien, Mr. Haince still has a claim against the owners with whom he contracted to do the work. There is no evidence that the respondents are impecunious, or that they would or could not answer to a judgment should Mr. Haince ultimately be successful at trial.

[20] There is also a counterclaim by the respondents against Mr. Haince waiting to be litigated. An interlocutory appeal can cause unnecessary delay and expense.

[21] In the proposed Notice of Application for Leave to Appeal, he sets out the grounds of appeal to be advanced:

- (1) The Judge erred in his decision.
- (2) My Affidavit was not considered as evidence.
- (3) A document brought by myself to court was not considered as evidence.
- (4) Instructions to the plaintiff were not properly given.

[22] While it is prudent to avoid applying too stringent an approach to weighing proposed grounds of appeal, in the circumstances of this application, I fail to see even a glimmer of merit in any of these proposed grounds.

[23] A generic conclusionary statement that the judge erred is without meaning. What were the contents of the affidavit or document? In what way would they have made an impact on the outcome? Similarly, what instructions were given or

omitted and how would they have made any difference? I have no explanation from Mr. Haince.

[24] Justice McDougall's Order to Vacate the Lien says that pursuant to ss. 34(7) and 29(4) of the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, the lien is vacated. Mr. Whitehead, in response to a question, explained that the builders' lien was vacated, not by the posting of security (s.29 (4)), but because the time limits for starting an action to enforce the lien were missed. Mr. Haince did not dispute this explanation. Instead, he called it a technicality.

[25] I am not satisfied Mr. Haince has met the burden that the interests of justice require an order to extend the time. His application is dismissed with costs in the amount of \$250.00 payable forthwith.

Beveridge J.A.