

COURT OF APPEAL FOR ONTARIO

DATE: 20190111
DOCKET: M49896

B.W. Miller J.A. (Motion Judge)

BETWEEN

Stewart Wilson

Appellant/Moving Party

and

Sara Fatahi-Ghandehari

Respondent/Responding Party

Paul Robson, for the moving party

Shahzad Siddiqui and Amar Mohammed, for the responding party

Heard: December 19, 2018

ENDORSEMENT

Overview

[1] The moving party, Mr. Wilson, brings a motion seeking the following orders:

1. An extension of time to serve and file a notice of appeal of the order of Price J. dated October 10, 2017, finding the moving party in contempt;

2. An extension of time to appeal the costs order of Price J. dated January 26, 2018; and

3. an extension of time to serve and file a notice of appeal of the order of Price J. dated September 21, 2018, striking Mr. Wilson's pleadings and allowing the respondent to proceed to an uncontested trial.

[2] The moving party also seeks other relief, including a stay of the above orders pending appeal.

[3] This motion is the latest component of complex and long-running matrimonial litigation between the moving party and the responding party, Ms. Fatahi-Ghandehari. The relevant procedural history begins with the order for contempt made by Price J. on October 10, 2017, with reasons reported at 2017 ONSC 6034. On January 11, 2018, Price J. issued an order dealing with the procedural consequences of the October 10, 2017 contempt order. On January 26, 2018, in reasons reported at 2018 ONSC 669, Price J. ordered the moving party to pay the responding party \$94,439.75 in costs for the October 10, 2017 contempt motion.

[4] The moving party served a notice of appeal of the contempt order, which notice was dated November 10, 2017, but did not file it.

[5] Subsequently, he served a second notice of appeal on the responding party, dated January 26, 2018, and then an amended notice of appeal dated January 31, 2018. These were both out of time and were not accepted for filing. No motion for leave for an extension of time was brought with respect to these notices. However, a fourth notice of appeal – in the form of a second amended notice of appeal dated January 31, 2018 – was served and filed in time. Unlike the three previous notices of appeal, it was not, on its face, an appeal of the October 10, 2017 contempt order, and was instead framed as an appeal of the January 11, 2018 order dealing with procedural consequences of the October 10, 2017 contempt order. Although the fourth notice of appeal did not state it was an appeal of the October 10, 2017 contempt order, it did include, in the relief sought, that the October 10, 2017 contempt order be set aside.

[6] The responding party brought a motion to quash the fourth notice of appeal, and that motion was granted by this court on August 29, 2018, with written reasons given on September 4, 2018 and reported at 2018 ONCA 728. The appeal was quashed on the basis that it was an appeal from an interlocutory order and this court therefore lacked jurisdiction to hear it. The reasons for decision also dealt with the argument that the fourth notice of appeal was an appeal of a final order, because it sought to set aside the contempt order. This court rejected that argument, stating that the moving party “is well out of time for that appeal and has not brought a motion for an extension of time to appeal.” The

court noted that the moving party had “taken no steps to settle the terms of the October 10, 2017 contempt order, or to perfect his appeals of the January 11, 2018 order, and the January 26, 2018 costs order. In our view the appellant’s failure to attend to these appeals after such a long passage of time is procedurally abusive.” It carried on to state that given the “procedural morass” of this case, including the “record of non-compliance with customary practice and the rules”, “we would quash the appeal even if the order under appeal were final, in the exercise of our inherent jurisdiction to control the process of the court and to prevent its abuse”.

[7] On September 21, 2018, the motion judge released the final sentencing order with respect to the October 10, 2017 contempt order, with reasons reported at 2018 ONSC 5579. The sentencing order strikes the moving party’s pleadings and allows the responding party to continue to an uncontested trial.

[8] On this motion, the moving party now seeks an extension of time to file and serve a notice of appeal of the orders of Price J. dated October 10, 2017 (contempt), January 26, 2018 (costs), and September 21, 2018 (sentence).

Analysis

[9] The test for on a motion for an extension of time to appeal under r. 3.02(1) of the *Rules of Civil Procedure* is well-settled. The overriding principle is whether the “justice of the case” requires that an extension be given. The court must take

into account all relevant considerations, including (a) whether the moving party formed a *bona fide* intention to appeal within the relevant time period; (b) the length of, and explanation for, the delay in filing; (c) any prejudice to the responding parties, caused, perpetuated or exacerbated by the delay; and (d) the merits of the proposed appeal: *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15. This court has the inherent jurisdiction to control its own processes and has the express power under s. 140(5) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, to stay or dismiss a proceeding as an abuse of process: *Oelbaum v. Oelbaum*, 2011 ONCA 300, 94 R.F.L. (6th) 251, at para. 9.

[10] With respect to the motion for an extension of time to serve and file a notice of appeal of the October 10, 2017 contempt order, the time is now long past. More than a year has now passed since the deadline elapsed. Although I accept that the moving party maintained an intent to appeal, the various explanations for the delay – that it is due to his counsel’s health issues and temporary suspension from practice, that it is due to his counsel’s belief that an appeal of a contempt order cannot be perfected until the sentence has been imposed – are not satisfactory. The fact remains that beyond a flurry of notices of appeal, each of which was infirm in some way, no steps were taken to move this appeal along. To seek an extension of time at this juncture is an abuse of the

process of this court. The motion is dismissed with respect to the appeal of the October 10, 2017 contempt order.

[11] With respect to the January 26, 2018 costs order, the moving party has not, in the notice of appeal, sought leave to appeal that order as required by r. 61.03.1(17). What he requests, on this motion, is an order for an extension of time to file and serve the notice of appeal, and an order consolidating the costs appeal with the hearing of the main appeal. Even if the motion had been properly drafted to request an extension of time to seek leave to appeal the costs order, I would still reject it as an abuse of process on the same basis as the contempt order.

[12] The factor of the prejudice to the responding party flowing from the delay confirms my decision to dismiss the moving party's motion for an extension of time in respect of the October 10, 2017 and January 26, 2018 orders. The moving party has repeatedly failed to comply with multiple orders of the Superior Court. He has not paid the costs that Price J. ordered him to pay on January 26, 2018 even though nearly a year has elapsed since that order. The evidence of the responding party is that the moving party's failure to promptly file an appeal and comply with court orders has prejudiced her by embroiling her in vexatious and repetitive proceedings. This factor suggests that the justice of the case militates in favour of dismissing the motion.

[13] Furthermore, I was not convinced that the appeals of the October 10, 2017 and January 26, 2018 orders have sufficient merit to overcome the other factors I have already identified. Price J. provided lengthy and careful reasons for both orders. The orders appear to be grounded in factual findings that attract a deferential standard of review. While the appellant does argue that Price J. made some errors of law in his appeal of the October 10, 2017 contempt order, the bulk of the grounds raised in his Notice of Appeal appear to be fact-based.

[14] The motion with respect to leave to appeal the September 21, 2018 sentence order is, however, on a different footing. The proffered explanation for the delay is, once again, a general appeal to counsel's history of illness, the residual effects of his suspension from practice by the Law Society of Ontario, and his lack of diligence. That is, it is explained but hardly justified. And although the delay is not nearly as lengthy as with the appeal of the other orders, it is all the more remarkable given that the order to be appealed was made weeks after the moving party had the benefit of this court's reasons of September 4, 2018, where the moving party was admonished for his record of non-compliance with the *Rules of Civil Procedure*. It is yet another manifestation of a general indifference to the *Rules* – an indifference which has squandered vast sums in legal fees and unjustifiably consumed many hours of court time. The proposed appeal does not seem particularly strong – it is difficult to overturn a highly discretionary decision such as sentencing for contempt in the context of non-

disclosure: *Kovachis v. Kovachis*, 2013 ONCA 663, 367 D.L.R. (4th) 189, at paras. 24-26. It is, however, arguable. Most significantly, however, the procedural consequences are so great to the moving party – facing an uncontested trial – that I am willing to grant the moving party an extension to file a notice of appeal on or before February 7, 2019.

[15] For the same reasons, I will grant a stay of the order of Price J. dated September 21, 2018, striking the moving party’s pleadings, pending the disposition of the appeal of that order, or such further order of this court.

DISPOSITION

[16] The motion is dismissed with respect to the extension of time to appeal the orders of October 10, 2017 and January 26, 2018. Accordingly, it is not necessary to consider whether to grant a stay in respect of those orders. The motion for an extension of time to serve and file a notice of appeal of the order of September 21, 2018 is allowed. The order of September 21, 2018 is stayed on the terms above in para. 15. The respondent is awarded costs of the motion in the amount of \$5,000.

“B.W. Miller J.A.”