COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Green Arms v. Shahabaldin,* 2023 BCCA 340

Date: 20230811
Docket: CA49213

Between:

Esmail Tavakoli Niaki doing business as Green Arms

Appellant
(Claimant)

And

Mojgan Shahabaldin

Respondent
(Defendant)

Before: The Honourable Justice Griffin
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated June 8, 2023 (*Shahabaldin v. Green Arms*, Vancouver Docket S230673).

Oral Reasons for Judgment

The Appellant, appearing in person:	E.T. Niaki
The Respondent, appearing in person:	M. Shahabaldin
Place and Date of Hearing:	Vancouver, British Columbia August 11, 2023
Place and Date of Judgment:	Vancouver, British Columbia August 11, 2023

Summary:

The applicant was granted a monetary award after a small claims trial at provincial court. The respondent appealed the order to Supreme Court, but the applicant did not appear at the hearing. The respondent was partly successful on appeal and was granted judgment in her favour. The applicant filed an appeal of the Supreme Court order and sought an extension of time, claiming that he was not served with notice of the appeal hearing.

Held: Application dismissed. The appeal has no merit since this Court does not have the jurisdiction to hear such an appeal as per sections 5(2) and 13(2) of the Small Claims Act and section 13(3) of the Court of Appeal Act. However, the Supreme Court has the inherent jurisdiction to set aside an order where the order was made on the mistaken presumption that a party had been served. If the applicant was not served with the notice of appeal hearing as he alleges, he can bring a fresh application to the Supreme Court to reconsider the orders below.

GRIFFIN J.A.:

I. Background & Nature of the Application

[1] This is an application brought by Esmaeil Tavakoli Niaki, the sole proprietor of Green Arms (the “applicant”) seeking an extension of time to appeal the decision of Justice Fitzpatrick made June 8, 2023, which allowed an appeal in part of a decision of Provincial Court Judge St. Pierre made July 7, 2022.

[2] By way of background, Mr. Niaki owns and operates a landscaping business doing business under the name Green Arms, and entered into a contract with the respondent, Mojgan Shahabaldin, to install flagstone pavers in the front and side yards of the respondent’s property.

[3] The applicant used two subcontractors to complete the work. There was a concrete substrate in place, and the applicant alleges that the respondent chose to place the new flagstone over the existing substrate; the respondent disputed this claim. The original estimate was based on 800 square feet, but upon commencing the job, it became clear that the area comprised 1,034 square feet. The respondent purchased the stone directly and the applicant commenced work thereafter.

[4] During the job, the respondent requested a number of changes and became unhappy with alleged deficiencies.

[5] Upon completion of the job, the applicant sought payment of the account balance, but the respondent refused to pay on the basis of the alleged deficiencies. Despite attempts to mediate, no resolution was reached, and the applicant brought a claim under the *Small Claims Act,* R.S.B.C. 1996 c. 430 [*SCA*]; the respondent counterclaimed.

[6] After a three-day trial in Provincial Court—in which both parties were self-represented—the judge gave oral reasons for judgment on July 7, 2022. The judge allowed the applicant's claim in part, but not wholly, and dismissed the counterclaim. The judge held that the respondent was required to pay the applicant $4,420.24.

[7] On January 27, 2023, the respondent filed a notice of appeal in Supreme Court.

[8] The respondent's statement of argument was filed in the Supreme Court on March 13, 2023, but it does not appear that the applicant filed a response or argument. The hearing date was set for March 29, 2023.

[9] On March 29, 2023, the parties appeared before Justice Veenstra, and the hearing was adjourned. The applicant was directed to file a notice of interest and statement of argument by April 21, 2023.

[10] A notice of interest was filed by the applicant on April 20, 2023. I have no record of the applicant filing a statement of argument and the respondent says Mr. Niaki has not done so.

[11] The respondent filed a notice of hearing of appeal on May 9, 2023, setting down the hearing of the appeal on June 7, 2023 in the Supreme Court.

[12] What happened next is in dispute.

[13] The applicant says he did not receive the notice of hearing of appeal. The respondent says it was delivered by registered mail to Mr. Niaki and that Mr. Niaki signed for it. Although both parties have sworn affidavits, the evidence is unclear

and I cannot resolve the issue of whether notice of the hearing was effectively served.

[14] The respondent appeared in the Supreme Court on June 7, 2023 and the applicant did not. It appears that the matter was set over or continued to the next day, June 8, 2023.

[15] It appears that the applicant was not given notice of the hearing date on June 8, 2023.

[16] On June 8, 2023 Justice Fitzpatrick, in chambers, heard the appeal in the absence of the applicant.

[17] Justice Fitzpatrick allowed the appeal in part, setting aside the order of Judge St. Pierre. No formal order has been entered from the record before me, but the clerk's notes indicate that the order of Judge St. Pierre was set aside "with the [exception] of the deficiency claim", and the judge allowed costs on Scale B for appearances on June 7th and 8th, and ordered the respondent to file an affidavit of service. The respondent filed an affidavit of service the same day, June 8, 2023. She attaches documents indicating that Mr. Niaki appears to have signed for a delivery from Canada Post on May 12, 2023.

[18] There are no reasons for judgment in the record before me.

[19] On June 23, 2023, on a without notice application by the respondent, Justice Baker ordered that funds paid into court by the respondent to the credit of the action, in the amount of $4,420.24, be released to the respondent. She also ordered costs in a lump sum against the applicant in the amount of $3,316.00. This order has been entered.

[20] On July 14, 2023, the applicant filed a Notice of Appeal seeking leave to appeal from the order of Justice Fitzpatrick, but noted the date of pronouncement of the order as June 23, 2023.

[21] Pursuant to Rule 6(a) of the *Court of Appeal Rules*, B.C. Reg. 120/2022 [*Rules*], a Notice of Appeal must be filed "…not more than 30 days after the order is pronounced", meaning that the Notice of Appeal was filed out of time, if it was from the order of Justice Fitzpatrick.

[22] On July 19, 2023, the Registrar sent a letter to the parties advising that ss. 5, 12, and 13 of the *SCA* may bar an appeal from the order of Justice Fitzpatrick. The Registrar directed the applicant to amend the notice of appeal to properly outline which order he is appealing and, if appealing from Justice Fitzpatrick's order, to file an application for an extension of time to appeal, as the notice of appeal was out of time.

[23] On August 2, 2023, the applicant filed an amended notice of appeal, indicating that he is appealing from Justice Fitzpatrick's order of June 8, 2023, and a notice of application seeking an extension of time to appeal.

[24] For the reasons that follow, I would dismiss the application for an extension of time to appeal. As I will explain, this does not leave the applicant without a remedy if it is correct that he was not served with the notice of hearing of the appeal that took place in the BC Supreme Court.

II. The Test for an Extension of Time to Appeal

[25] The criteria for an application to extend time to commence an appeal were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259–260, 1987 CanLII 2608 (C.A.):

1) Was there a *bona fide* intention to appeal?
2) When were the respondents informed of the intention?
3) Would the respondents be unduly prejudiced by an extension of time?
4) Is there merit in the appeal?
5) Is it in the interest of justice that an extension be granted?

[26] The "interests of justice" is an overriding question and embraces the first four considerations; it is "the decisive question" on an application to extend time: *Davies*

at 260–261.

[27] In my view, the present application turns on the question of the merits of the appeal. The key argument on appeal is that the applicant was not given notice of the hearing of the appeal in the BC Supreme Court.

[28] As mentioned, both parties have filed affidavits addressing this question.

[29] Because of the brevity of the affidavits, the disputed facts, and a lack of clarity, I am unable to determine based on the evidence if and when Mr. Niaki was given notice of the appeal hearing below.

[30] The threshold question on the merits test is whether the appeal is "doomed to fail" or, alternatively, whether "it can be said with confidence that the appeal has no merit": *Stewart v. Postnikoff*, 2014 BCCA 292 at para. 6 (Chambers).

[31] Here, the central question is whether this Court has authority to hear an appeal of an order made by a Supreme Court judge, allowing an appeal of an order made by a Provincial Court judge after a small claims trial. The relevant statutory provisions lead to the conclusion that the answer to this question is no.

[32] The *SCA* contains the following provisions:

> **Right of appeal**
>
> 5 (1) Any party to a proceeding under this Act may appeal to the Supreme Court an order to allow or dismiss a claim if that order was made by a Provincial Court judge after a trial.
>
> (2) No appeal lies from any order of the Provincial Court made in a proceeding under this Act other than an order referred to in subsection (1).
>
> **Hearing of appeal**
>
> 12 An appeal to the Supreme Court under this Act
>
> (a) may be brought to review the order under appeal on questions of fact and on questions of law, and
>
> (b) must not be heard as a new trial unless the Supreme Court orders that the appeal be heard in that court as a new trial.
>
> **Decision**
>
> 13 (1) On an appeal, the Supreme Court may do one or more of the following:

> (a) make any order that could be made by the Provincial Court;
>
> (b) impose reasonable terms and conditions in an order;
>
> (c) make any additional order that it considers just;
>
> (d) by order award costs to any party to the appeal in accordance with the Supreme Court Rules.
>
> (2) There is no appeal from an order made by the Supreme Court under this section.
>
> [Emphasis added.]

[33] Likewise, the *Court of Appeal Act*, S.B.C. 2021, c. 6, limits an appeal to this Court where another enactment bars such an appeal:

> **Appellate jurisdiction**
>
> 13 (1) An appeal may be brought to the court
>
> (a) from an order of
>
> (i) the Supreme Court, or
>
> (ii) a judge of the Supreme Court, or
>
> (b) in any matter for which jurisdiction is given to the court under an enactment of British Columbia or Canada.
>
> …
>
> (3) If another enactment of British Columbia or Canada provides that there is no appeal or a limited right of appeal from an order or matter referred to in subsection (1), that enactment prevails.
>
> [Emphasis added].

[34] On the basis of these provisions, multiple authorities of this Court state that this Court does not have jurisdiction to hear appeals of orders of the Supreme Court made on appeals from a small claims matter: *Mohammed v. Hunyadi* (1995), 65 B.C.A.C. 230, 1995 CanLII 2809 (C.A.) at paras. 4–5; *Pour v. The Owners, Strata Plan BCS 2313*, 2014 BCCA 392 at para. 7; *Seaton v. Wayco Flooring Ltd.,* 2019 BCCA 242 at paras. 3–6; *Gokey v. Usher*, 2019 BCCA 470 at para. 9; *Zhao v. Li*, 2021 BCCA 347 at para. 14; *AAA Action Movers (2008) Inc. v. Walker,* 2021 BCCA 400, leave to appeal to SCC ref'd, 39901 (17 March 2022), at para. 42.

[35] As stated recently by this Court in *AAA Action Movers*:

> [16] These provisions [ss. 5, 12, and 13 of the *Small Claims Act*] establish a complete code as to a litigant's rights of appeal from an order made by a

> Provincial Court judge following a small claims trial. An appeal may be brought to the Supreme Court, but "no order of the Supreme Court made in appeal proceedings in a small claims action can be appealed to this Court": *Pour v. The Owners, Strata Plan BCS 2313*, 2014 BCCA 392 at para. 7.
>
> [Emphasis added.]

[36] It appears to me that the application for leave to appeal—and the appeal itself—are doomed to fail on the basis that this Court lacks jurisdiction to hear the appeal based on s. 13(2) of the *SCA*. I am unable to grant the application to extend the time to appeal in this Court as this Court does not have jurisdiction to hear the proposed appeal.

[37] I reach this conclusion mindful that there is a remedy in the Supreme Court available to the applicant if indeed he did not receive notice of the Supreme Court hearing of the appeal.

[38] The Supreme Court has inherent jurisdiction to set aside an order where it would constitute a miscarriage of justice or abuse of process if allowed to stand. This includes an order made on the mistaken presumption that a party had been served: *R & J Siever Holdings Ltd. v. Moldenhauer*, 2008 BCCA 59. This inherent jurisdiction exists in addition to the powers conferred on the Supreme Court by the *Supreme Court Civil Rules*: *Esteghamat-Ardakani v. Taherkhani,* 2023 BCCA 290 at para. 86.

[39] This inherent jurisdiction is made express in the *Civil Rules* in respect of a party who did not have notice of a BC Supreme Court Chambers hearing. Rule 22-1(3) applies to an order made without notice in Chambers, allowing a party who did not attend to seek reconsideration of the order if the person satisfies the court that the person's failure to attend was not due to wilful delay or default. The proper remedy for such a party is to first apply in Supreme Court under Rule 22-1(3) for reconsideration of the application, rather than to first appeal: see *Chinese Social Development Society v. The Vancouver Chinese Public School*, 2021 BCCA 100 at paras. 12–13.

[40] An appeal from Small Claims Court is governed by R. 18-3. The parties have not directed their minds to whether R. 22-1(3) applies. Even if it does not, inherent jurisdiction continues to apply and I would follow the procedure under R. 22-1(3) by analogy. In other words, if the applicant wishes to challenge the order made by Justice Fitzpatrick on the basis that he did not have notice of the hearing, his remedy is to move promptly to bring a fresh application in the BC Supreme Court to reconsider and set aside the order, based on the inherent jurisdiction of the court to set aside an order that was obtained based on a miscarriage of justice or abuse of process.

[41] At the same time, it would make sense for the applicant to apply to the Supreme Court to reconsider and set aside the without notice order of Justice Baker for the same reasons.

[42] Any judge hearing an application to set aside these orders will be looking for affidavit evidence from Mr. Niaki explaining why he did not appear in court on the dates set for hearing. If this was due to the fact he says he was not served with notice, it would be helpful if he attached to the affidavit those documents that were served on him as he acknowledged when he signed for the Canada Post registered mail. Also, it is important that Mr. Niaki move promptly if he is going to bring application in the Supreme Court to reconsider the two orders. While some delay in applying to set aside those orders may be explained by the difficulty in knowing whether the remedy lies in this Court, it is likely that a court will need to be satisfied that Mr. Niaki has moved promptly to set aside the orders.

III. Disposition

[43] In conclusion, the application for an extension of time to appeal is dismissed.

"The Honourable Justice Griffin"