Court of King's Bench of Alberta

Citation: Garg v Condominium Corporation No. 1311600, 2023 ABKB 684

Date: 20231204
Docket: 2301 07467
Registry: Calgary

Between:

Shashank Garg

Appellant

- and -

Condominium Corporation No. 1311600

Respondent

Reasons for Judgment on Appeal
of the
Honourable Justice Lisa A. Silver

Appeal from the Decision by
A. Argento the Honourable Justice
Filed on the 9th day of May, 2023
Docket: P2290101354

Introduction and Procedural Background

[1] The Appellant, Shashank Garg, appeals the May 9, 2023, decision of Justice Argento dismissing Mr. Garg's claim for fifty thousand dollars in damages against the Respondent Condominium Corporation in which he owned a unit.

[2] Mr. Garg filed an appeal against the trial judgment on June 7, 2023, which was one day within the thirty-day deadline for filing an appeal under section 46 of the *Court of Justice Act* [*Act*]. According to the affidavit of service, on the same date Mr. Garg served the Respondent's lawyers with the Notice of Appeal and the transcripts, which were also filed with the court. The transcripts contained the reasons for judgment as well as submissions and ruling on costs.

[3] The Notice of Hearing, dated September 14, 2023, set the hearing of the appeal for Friday December 1, 2023, at 2:00 PM.

[4] The procedure for launching an appeal is found under section 46 of the *Act*. Section 46(3) requires the Appellant to file with the Court of King's Bench and serve on the Respondent,

> a transcript of the evidence heard before the judge of the Court of Justice within 3 months of the date that the notice of appeal is filed in the Court of King's Bench, unless an order has been made by a judge of the Court of King's Bench prior to the expiration of the 3-month period extending the time for filing the transcript.

[5] Section 48(1) requires the Court of King's Bench to dismiss an appeal where the appellant fails to comply with section 46.

Issues and Position of the Parties

[6] The Respondent submitted the appeal is statute barred and must be dismissed under section 48. The Respondent argued the Appellant did not file with the Court or serve on the Respondent the transcript of the evidence heard by the judge of the Court of Justice within three months of the date the Notice of Appeal was filed. Neither did the Appellant obtain an order from this court to extend the time to file the transcript before the expiration of that period, which was on September 7, 2023.

[7] Mr. Garg responded that the reasons for judgment are a sufficient basis for the appeal. In his view, the transcript of the evidence at trial would not add any further information needed to argue the appeal. In support, Mr. Garg pointed to the summary of evidence contained in the reasons. In substance, Mr. Garg argued, the requirement under section 46 was fulfilled.

[8] The issues raised by this argument are as follows:

1. What is the meaning of "transcript of evidence heard before the judge"?
2. If there is a failure to comply with section 46, can the Court exercise their discretion not to dismiss the appeal under section 48?

[9] For reasons to follow, I find the reasons for judgment are not equivalent to the transcript of evidence heard before the judge and therefore the Appellant failed to comply with section 46. I further conclude that in accordance with section 48 the Court does not have discretion to extend the time to file the transcript of evidence. Therefore, the appeal must be dismissed.

Analysis

Meaning of "transcript of evidence heard before the judge"

[10] First, I will discuss the meaning of the phrase "transcript of evidence heard before the judge" under section 46. Using the modern approach to statutory interpretation, requiring the phrase to be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act," I find the plain and ordinary meaning of the phrase is clear and unambiguous: ***Rizzo & Rizzo Shoes Ltd. (Re)***, 1998 CanLII 837 (SCC), [1998] 1 SCR 27 at para 21. The transcript must reflect the entire evidence heard at trial before the judge.

[11] In this case, there was testimony heard by the trial judge, notably, the evidence of the Appellant, Mr. Garg. At best, as submitted by Mr. Garg, the reasons contained a summary of the evidence. The transcript filed was clearly marked as an excerpt on the title page. Also, in the table of contents, the "Reasons for Judgment" were clearly marked. There is no mistaking this excerpt as the transcript of evidence heard before the judge.

[12] There are also significant differences in content between the transcript of evidence heard before the judge and the transcript of the reasons for judgment. A judge hears evidence during the trial, while a judge gives reasons for judgment after hearing the evidence. The reasons for judgment are based on the legal and factual conclusions based on the trial evidence. The hearing of evidence by the judge and the giving of reasons by the judge are two different actions involving different content.

[13] This content difference matters for an appeal. The judge's reasons may summarize the evidence upon which the judge makes their findings, but the appeal court may need to turn to the source of the judge's reasons and review the actual evidence to properly consider and understand the findings of the trial judge. Without proper evidence of what happened at trial it is difficult for the appeal judge to adequately assess the strength of the appeal. A lack of the evidence at trial also causes difficulties for the parties arguing and defending the appeal. By requiring the transcript of evidence, the rules promote an effective, efficient, and fair appellate process for everyone: ***Shebib v Victoria (City)***, 2012 BCCA 42 at para 11.

[14] The importance of access to the transcript of the evidence is further highlighted by the finality of an appeal. Once the Court of Kings Bench decides an appeal, whether it is allowed or dismissed, there is no further recourse. There is a very limited exception to this finality. If a transcript of evidence is unable to be reproduced either because the recording does not exist or the recording is damaged or unintelligible, then the matter may be sent back for a new hearing.

[15] The burden of showing the transcript cannot be provided is on the appellant, who is required to apply to the court for this relief. In this case, there is no evidence the transcript of evidence was not reproducible or could not be provided. Moreover, there was no application by Mr. Garg under section 46(4). I therefore reasonably conclude that Mr. Garg simply did not order it.

[16] Furthermore, the need for the transcript of the evidence on appeal is consistent with the scheme of the *Act* as it relates to civil matters. In ***Fulo v Elmwood Car Sales Ltd***, 2022 ABCA 181 [*Fulo*] at paragraph 18, the court, in finding they had no jurisdiction to hear a civil appeal under the *Court of Justice Act*, commented on how the civil claims process is intended to "match the relatively modest sums" in issue with the public resources needed to finally resolve those claims in a fair and just manner. The appeal process is in place to encourage expeditious finality

to civil claims, which, in my view, includes encouraging a potential appellant to weigh the costs of ordering the transcript of evidence against their prospect of success on appeal. To fulfill these objectives, the statutorily imposed deadlines must be followed.

[17] Finally, in the recent decision of ***Gunda v Allied Shortridge Civil Enforcement Agency***, 2022 ABQB 431 [*Gunda*], Justice Devlin considered a similar situation under the same legislation, then named as the *Provincial Court Act*. Justice Devlin found the phrase "transcript of evidence" means the transcript of all the evidence must be filed and served in an appeal: ***Gunda*** at para 51. In the ***Gunda*** decision, the filed transcript was incomplete, containing only some of the evidence heard at trial. Justice Devlin found the Appellant failed to comply by not filing the entire transcript of evidence and dismissed the appeal.

[18] In the case before me, the transcript Mr. Garg filed is not even a partial transcript of the evidence, being only the reasons for judgment. Although I appreciate that both the Appellant and the Respondent were able to file briefs based on the reasons for judgment only, both parties conducted the trial before Justice Argento. They had the advantage of hearing the evidence at trial. This is not always the case on appeal, where there may be different counsel acting on behalf of the parties. In any event, it is not their recollection that matters on appeal, but the evidence duly recorded at trial that does. Finally, the appeal judge does not have that trial advantage, and requires the full transcript of the evidence to properly and fully appreciate the merits of the appeal.

[19] On this basis, I find the appellant failed to comply with section 46 of the Act.

Discretion not to dismiss the appeal under section 48

[20] The next issue raised is whether I am obliged to dismiss the appeal because Mr. Garg did not comply with section 46. I find I have no discretion to do otherwise. Particularly, I find I have no discretion to extend the time permitted to file the transcripts for the following three reasons.

[21] First, the language in section 48 is directive and not permissive. The court "shall" dismiss the appeal for non-compliance with section 46. The language under section 46(3) is also clear that an extension of time to file transcripts must be made before the three-month expiration deadline: ***Gunda*** at para 51. In this case, the three-month deadline of September 7, 2023, has passed.

[22] Second, I find there are no special rules for self-represented litigants. Mr. Garg ably argued that the civil division within the Court of Justice is the "people's court." He urged that a rigid reading of the appeal procedure would be contrary to the relaxed context of the civil division and would impact access to justice. Although the argument is attractive, it must also be balanced with the comments made in ***Fulo*** that self-represented litigants are expected and required, like all litigants, to be aware of and comply with appeal procedures: ***Fulo*** at para 23. This position has also been applied in the context of arbitration proceedings: ***0927613 BC Ltd v 0941187 BC Ltd***, 2015 BCCA 457 at para 64.

[23] Mr. Garg also suggested that when he filed his material, there was no indication his transcript was deficient and not in compliance with the *Act*. Indeed, the court administration issued a Notice of Hearing. In line with this argument, I asked counsel for the Respondent to comment on the effect of section 50 of the *Act*, that states "On sections 46 and 47 being complied with, the Court of King's Bench shall set down the appeal for hearing at a regular sitting." The Respondent submitted that this section sets out an administrative procedure, which

does not preclude the setting of a hearing date where section 46 is not fulfilled. In other words, the section does not prohibit the court from setting down a hearing date in Mr. Garg's appeal even though he failed to comply with section 46.

[24] I agree with counsel's submissions. The setting down of a hearing date is an administrative task. The burden is not on the court administration to review, in this case the filed transcript, to ensure it is the complete transcript of evidence. In ***Gunda***, Justice Devlin was concerned with the non-alignment between the information posted and conveyed by the court administration on the appeal procedures and the requirements of the *Act*: ***Gunda*** at para 52. In that case, the Appellant was represented by counsel and Justice Devlin commented on counsel's responsibility to know the law and the appeal procedures. In the case before me, although Mr. Garg is a self-represented litigant, it is Mr. Garg's responsibility, as the Appellant, to inform himself of what he needed to do to properly launch and argue his appeal on the merits.

[25] Third, case authority has interpreted the section as mandatory with no room for discretion. This is clear in Justice Devlin's decision in ***Gunda*** which I adopt and rely on. I am also bound by the 2013 Court of Appeal for Alberta decision in ***Kehewin Cree Nation v Mulvey***, 2013 ABCA 294 [*Kehewin*]. In that decision, the Court found the Court of King's Bench does not have the power to extend the statutory deadline under section 46. As noted in the reasons of Justice Côté in paragraph 21 of ***Kehewin***, the consequence of failing to comply with section 46 is spelled out in section 48. That consequence is the mandatory dismissal of the appeal. In Justice Côté's opinion, "nothing could be clearer": ***Kehewin*** at para 21.

Conclusion

[26] The appeal is dismissed pursuant to section 48(1) of the *Court of Justice Act*.

Costs

[27] I asked Mr. Garg and the Respondent to make submissions on costs should the appeal be dismissed.

[28] Counsel for the Respondent requested costs based on the *Alberta Rules of Court* Schedule C tariff for the preparation and arguing of appeals. For instance, counsel referenced as an appearance on a contested application before an appeal court under paragraph 22 for which the tariff under column one amount is $1000.

[29] In support, counsel for the Respondent outlined the work done for the appeal including the preparation of the brief. I asked counsel why the Respondent did not bring a motion to strike the appeal after the three-month deadline for filing the transcript of evidence expired instead of waiting for the appeal to be heard. Counsel submitted that they were not aware the transcript was deficient until November. By that point, the appeal had been set down for hearing.

[30] It may be that practically speaking, the transcript served on counsel was not immediately reviewed. That, however, does not change the reality that counsel should have or ought to have known that the deadline for filing and serving the transcript of all the evidence had expired. At that point, it was open to the Respondent to at least file a notice of application to strike the appeal, even before the Notice of Hearing was issued a week later. This would have saved court resources obviating the need for a half-day hearing of the appeal. It also would have required much less preparation time on the appeal briefs.

[31] Another concern raised during submissions on costs was the Respondent's written demand of Mr. Garg to indemnify the Respondent for the solicitor-client costs of the entire action. The demand notice was sent two days before the hearing of the appeal. This information was concerning considering Justice Argento ordered schedule C costs at trial.

[32] Counsel for the Respondent was clearly unaware of this demand for full indemnification by the Respondent. As an officer of the Court, counsel undertook to speak to the Respondent about this request, agreeing full indemnification was not sought by counsel at the time of trial or before me on appeal. Counsel also suggested the Respondent was not acting in a high-handed manner in enforcing the charge back of fees as it was likely an administrative act.

[33] Although I appreciate counsel's undertaking to rectify this situation, I do not accept that this was a mere administrative oversight on the part of the Respondent. I can reasonably assume counsel advised the Respondent of the outcome of the trial, including the costs decision. The Respondent knew or ought to have known that the charge back was inappropriate and open to the discretion of the court: ***Suri Holdings Inc. v Hyumin Jung***, 2022 ABKB 714. In saying this, I cast no blame on counsel for the Respondent.

[34] I therefore award the Respondent $340 in costs. The costs award is based on 50% of the schedule C column one amount of $675 pursuant to paragraph 7(1) for contested applications including an appeal from Court of Justice. Cost awards are discretionary and based on several factors. Some of the factors I have relied on in coming to this amount include the following:

- the conduct of the Respondent (not counsel) in enforcing the charge back fees when a cost award had already been determined;
- the decision by the Respondent not to bring an application to strike the appeal upon the three-month expiration of the filing deadline;
- the conduct of Mr. Garg in filing the Appellant's brief one week after the deadline; and
- the dismissal of the appeal for non-compliance by Mr. Garg.

[35] I thank counsel for the Respondent and Mr. Garg for their helpful submissions.

Heard on the 1st day of December, 2023.
Dated at the City of Calgary, Alberta this 4th day of December, 2023.

Lisa A. Silver
J.C.K.B.A.

Appearances:

Shashank Garg
Self-Represented Litigant

Dionne Levesque
for the Respondent