

CANADA / JUDGMENT

MacLanders v. MacLanders

2012 BCCA 218

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 218 MacLanders v. MacLanders COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: MacLanders v. MacLanders, 2012 BCCA 218 Date: 20120510 Docket: CA039486 Between: Marlene Margaret MacLanders Respondent (Claimant And Daniel Kent MacLanders Appellant (Respondent Before: The Honourable Mr. Justice Hinkson (In Chambers) On appeal from Supreme Court of British Columbia, October 27, 2011 (MacLanders v. MacLanders, New Westminster Registry E033507) Oral Reasons for Judgment Counsel for the Appellant: G.A. Pyper Counsel for the Respondent: J.M. Dreyer Place and Date of Hearing: Vancouver, British Columbia May 10, 2012 Place and Date of Judgment: Vancouver, British Columbia May 10, 2012 (stay application; extension of time to appeal; leave to have two appeals heard together)

- [1] HINKSON J.A.: On March 29, 2011 Mr. Justice Myers heard a summary divorce trial. He granted the divorce and divided the family assets and ordered that the appellant pay spousal support to the respondent.
- [2] Counsel for the parties attempted to agree on the form of the order, but were unable to do so. On June 16, 2011 counsel for the parties appeared before Myers J. in an attempt to clarify his order. As a result of that appearance, counsel exchanged further draft orders that differed in form from those originally exchanged.
- [3] On July 14, 2011 counsel for the appellant attempted to file a Notice of Appeal of the March 29, 2011 order of Myers J., but it was rejected by the Registry on the basis that it was not filed within 30 days of the pronouncement of the order.
- [4] The applicant seeks the following orders:
- a) An order pursuant to s. 18 of the Court of Appeal Act R.S.B.C. 1996, c. 77 and Rule 9 of the Court of Appeal Rules B.C. Reg. 297/2001, that payment of spousal support by the appellant to the respondent as ordered by Mr. Justice Myers on March 29, 2011 be stayed pending his proposed appeal;
 - b) An order pursuant to s. 10 of the Court of Appeal Act and Rule 52 of the Court of Appeal Rules to extend the time to appeal that order;

- c) In the event that the Court allows the appeal of that order, the appellant seeks an order that that appeal be heard with the applicant's appeal of the order of Truscott, J. of October 27, 2011.

Background

- [5] Myers J. ordered spousal support in the amount of \$1,111.00 per month from May 1, 2010 with some limited retroactivity and no end date. He also ordered a division of assets including a division of the applicant's employment pension.
- [6] Following the hearing on March 29, 2011, the applicant advised his counsel that he had planned to retire at the end of March, 2011. The applicant's decision to retire was not brought to the attention of Myers J. or the applicant's counsel before the hearing. Although his counsel conceded that he was aware of the applicant's decision to retire before the appearance before Myers J. on June 16, 2011, he did not attempt to lead evidence of the decision on that occasion, despite the fact the order of Myers J. had yet to be entered.
- [7] The applicant did not file a Notice of Appeal within the 30 days that followed the pronouncement of the order of Myers J. When his counsel attempted to do so on July 14, 2011 his Notice of Appeal was rejected by the Registry. The only aspects of the decision of Myers J. that are raised in the rejected Notice of Appeal are the division of the parties' chattels, vehicles and RRSP's, and the order for costs. Notably the award for spousal maintenance is not referred to in the Notice of Appeal.
- [8] The legal assistant to the applicant's counsel swears that after the rejection of the Notice of Appeal, she was instructed by the applicant's counsel to inquire as to the reason for the rejection. In her memorandum to the applicant's file dated July 15, 2011 the legal assistant recorded: Telephone call to Torri at the Court of Appeal Registry (604) 660-2468. · discussed rejection of Notice of Appeal · if an Order is made that requires clarifying then a Notice of Appeal must still be filed within the 30 days to preserve the right to appeal · after the Order is clarified then the party could proceed with the appeal or abandon it · all depends on whether a new order was made on the latter date · if the order was simply clarified then an application must be brought together with a supporting affidavit · if the hearing back before the Judge in the lower court resulted in a new order then a Notice of Appeal can be filed referencing only the date the later order was made · Note: when setting a date for Chambers, Court of Appeal Chambers starts at 9:30 and they sit Monday through Friday · there are a few dates in the near future that are not available and those are August 1st and 8th
- [9] Despite this advice, no motion to extend the time for filing the Notice of Appeal was filed by the applicant. Instead, on October 27, 2011 his counsel appeared before Mr. Justice Truscott in New Westminster, B.C. on an application to retroactively cancel the spousal support ordered by Myers J. since April 1, 2011. On that application the applicant argued a material change of circumstances due to his retirement on 1 April 2011. In his affidavit in support of the application he deposed that he had decided to retire in March 2011. Truscott J. found

that there could not be a material change of circumstances as the circumstances of the retirement existed at the time of the original order of March 29, 2011, and so dismissed the application.

[10] A Notice of Appeal from the order of Truscott J. was filed by the applicant on November 15, 2011, but the applicant made no attempt to apply for an extension of time within which to file a Notice of Appeal from the order of Myers J. of March 29, 2011 until April 4, 2012.
Extension of time to file the Notice of Appeal

[11] Under s. 10(1) of the Court of Appeal Act, a justice may extend or shorten the time within which an appeal to the court or application for leave to appeal may be brought.

[12] The criteria in an application to extend time to appeal or seek leave to appeal were set out in *Davies v. C.I.B.C.* (1987), 15 B.C.L.R. (2d) 256 at 259-260 (C.A.) and may be summarized as follows:

- 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?
- 4) Is there merit in the appeal?
- 5) Is it in the interests of justice that an extension be granted? The fifth question is the most important as it encompasses the other four questions and states the decisive question.

a) Bona Fide intention to Appeal

[13] In his affidavit, the applicant deposes at para. 19 that: I always had a bona fide intention to appeal the decision of Mr. Justice Myers although I always believed that Mr. Justice Myers would come to terms with the mistakes when he clarified the Order on June 16, 2011 which did not happen.

[14] Taking that statement at face value, one might excuse the applicant's failure to file his Notice of Appeal until he in fact attempted to do so in July of 2011, but once his Notice of Appeal was rejected by the Registry, and his counsel's legal assistant received the advice that she said she did from the Registry, the applicant's conduct is simply inconsistent with any intention to appeal the order of Myers J. He took no steps to obtain an extension of time to file his Notice of Appeal for over eight months, but in the interim brought the application before Truscott J. to vary the support ordered by Myers J. When he was unsuccessful in his attempt to vary the support, he appealed the order of Truscott J., but still took no steps to obtain any extension of time to appeal the order of Myers J. for another four-and-a-half months.

- [15] I conclude that even if the applicant initially had a bona fide intention to appeal the order of Myers J., he elected to pursue his application to vary the order rather than to appeal it, and thus had no bona fide intention to appeal the order he now seeks leave to appeal once he made that election, long before the application he now brings to extend the time to file his Notice of Appeal from the order of Myers J.
- b) Was the respondent informed of any Intention of the appellant to Appeal the order of Myers J.?
- [16] The applicant does not suggest that the respondent was advised that he intended to appeal the order of Myers J. prior to the filing of the application before me to extend the time for filing a Notice of Appeal.
- c) Would the Respondent be Unduly Prejudiced by an Extension?
- [17] The respondent has been put to the time and expense of the application before Truscott J. which might have been avoided, had the applicant pursued an appeal from the order of Myers J. In my opinion the applicant must bear the consequences of his chosen course of bringing that application.
- [18] To permit the applicant to now go behind the basis for his application before Truscott J. would be to permit him to litigate his differences with the respondent on a basis that he must be taken to have abandoned. In my view that would unduly prejudice the respondent.
- d) Merit of the Appeal
- [19] An extension of time to file a Notice of Appeal, as opposed to an extension of time to take a step necessary to prosecute the appeal, should not be granted if the appeal is without merit. *Franks v. B.C. (A.G., B.C. Benefits Board)*, 1999 BCCA 165, (Proudfoot J.A. in Chambers), aff'd 1999 BCCA 407, leave to appeal to SCC refused, [1999] S.C.C.A. No. 361.
- [20] As Mr. Justice Lambert observed in his concurring reasons in *Davies* at page 262: An assessment of the merits of the appeal is relevant to a decision about whether to grant an extension of time for perfecting the appeal, and it is relevant in other cases where a request is made for an exemption from a penalty for non-compliance with the rules. But the relevance is confined to the question of whether the appeal is bound to fail, just as it is on the question of striking out an appeal as being vexatious, frivolous, or entirely without merit. If the appeal is bound to fail, then that is a good reason for refusing an extension of time. But if the appeal is not bound to fail, and therefore has some bona fide arguable issue, the question of whether to grant an extension of time for perfecting the appeal should not be any further influenced by an assessment of the merits, but should instead turn on a consideration of the other factors, particularly the overriding factor of an assessment of the interests of justice, as those interests affect both parties.

- [21] The applicant contends Myers J. erred in dividing the family assets as he intended to divide them equally, but did not do so. The applicant also now argues Myers J. erred in awarding retroactive spousal support from August 24, 2009, despite the fact that the parties resided together from the time of separation on May 22, 2007 until the matrimonial home was sold on April 30, 2010, during which time the applicant maintained all payments and expenses of the parties in the same fashion as during the marriage. He also argues that the award for spousal support following March of 2011 ought not to have been made. The applicant also argues Myers J. erred in ordering costs of the summary trial on the average scale.
- [22] I am unable to say that the proposed appeal is bound to fail or that it has no bona fide arguable issue. The application must therefore be resolved by determining whether it is in the interests of justice that the extension sought by the applicant be granted.
- e) The Interests of Justice
- [23] It is not in the interests of justice to grant an extension when both counsel and the applicant have let the matter "drift along" for too long: Hansen (Trustee of) v. Hansen (1988), 71 C.B.R. (N.S.) 79 at 81 (C.A.)
- [24] In Clock Holdings Ltd. v. Braich Estate, 2009 BCCA 269 at para. 32, Mr. Justice Frankel said: This brings me to the last, and most important factor, i.e., is it in the interests of justice to grant the extension. Notwithstanding that I have found that the appeal has some merit, and that the respondents would not be unduly prejudiced by allowing it to go forward, I have concluded that Clock Holdings has, by its conduct, disentitled itself to any dispensation from the rules that govern how an appeal is to be brought in this Court.
- [25] I find those comments equally apposite to the applicant and his conduct in this case, and therefore dismiss the application to extend the time for filing a Notice of Appeal from the order of Myers J.
- [26] Given my disposition of the application to extend the time for the filing of the Notice of Appeal, it is unnecessary for me to resolve the applications for a stay of the order of Myers J. or to have the appeal of that order heard with the appeal of the order of Truscott J. "The Honourable Mr. Justice Hinkson"

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