

COURT OF APPEAL FOR ONTARIO

DATE: 20180115
DOCKET: M48641 (C64400)

Strathy C.J.O. (In Chambers)

BETWEEN

Kimberley Woodall

Applicant (Appellant)
Moving Party

and

The Corporation of The Town of Whitchurch-Stouffville

Respondent (Respondent)
Responding Party

Scott Lemke, for the moving party

R. Andrew Biggart, for the responding party

Heard and released orally: January 4, 2018

ENDORSEMENT

[1] The moving party seeks an order setting aside the Registrar's dismissal of her appeal for delay and extending the time to perfect the appeal.

[2] At the outset of the motion, the appellant sought leave to file additional material. The respondent objected.

[3] Having heard counsel's explanation of the relevance of the material, namely that the building on the property does not constitute a danger, I concluded that the evidence was not relevant and should not be received. The appellant's motion for a stay of the demolition order was dismissed by van Rensburg J.A. on November 15, 2017. There has been no appeal of that order. The present condition of the property is not relevant to this motion.

[4] There is no dispute about the test applicable to the motion. It is sometimes expressed as having four factors. At other times, it has been expressed as having five factors. In any event, it requires a consideration of: (a) whether the appellant had an intention to appeal within the time for bringing the appeal; (b) the length of the delay; (c) the explanation for the delay; (d) any prejudice to the respondent caused by the delay; and (e) the justice of the case, which includes a consideration of the merits of the appeal: see *Issasi v. Rosenzweig*, 2011 ONCA 112, 277 O.A.C. 391, at para. 4; *Paulsson v. University of Illinois*, 2010 ONCA 21, at para. 2.

[5] The first two factors, viewed in isolation, favour the appellant's position. The notice of appeal was filed within the requisite time and the delay has not been lengthy. As to the third factor, the explanation for the delay, the appellant explains the delay in part by the inability to obtain transcripts. Since the motion was argued on affidavit evidence and not *viva voce* evidence, transcripts were not required in order to perfect the appeal.

[6] However, the appellant also says that she did not receive the Registrar's notice of intention to dismiss for delay because the Registrar used the wrong postal code in her address. This was arguably her own fault in putting that address on her notice of appeal. In any event, there was evidence that she did not live at that address.

[7] I am, however, prepared to accept that because the appellant was self-represented, she may well have had difficulty in understanding the precise requirements in order to perfect the appeal. As with the first two factors, this factor, viewed in isolation, favours the appellant's position.

[8] As to the fourth factor, prejudice, I have noted that a motion for stay of the order was brought by the appellant and was dismissed. The respondent is, therefore, free to proceed with the demolition. The appeal of the demolition order has become moot, in light of the dismissal of the stay motion.

[9] I do not see any prejudice to the respondent if the appellant is able to proceed with the appeal in relation to the finding of contempt. I accept that the respondent may suffer some inconvenience and expense in responding to that aspect of the appeal, but that is compensable through an award of costs if the appeal does not succeed on that issue.

[10] Turning to the last factor, the justice of the case, I agree with the respondent that the appellant's conduct evidences a history of dilatoriness and delay. The

appellant consented to an order two years ago and simply failed to comply with it. No error has been identified with respect to the finding of contempt. Nevertheless, while the respondent has taken no steps to have the penalty determined, the respondent does indicate that it may attempt to enforce the contempt order if the appellant interferes with the demolition of the property. The appellant may, therefore, have an interest in proceeding with the appeal in relation to contempt and notwithstanding the absence of evidence concerning the merits of that appeal, the finding of contempt is a significant one. Weighing all the factors in the balance, the appellant should be permitted to proceed with the appeal in that regard, if so advised.

[11] Accordingly, and in summary, I grant an order extending the time to perfect the appeal in relation to the contempt finding until February 28, 2018, which I assume should be ample time to do so.

[12] Costs of this motion to the respondent in the amount of \$4,000, inclusive of disbursements and all applicable taxes.

G.B. Shaty C.J.O.