

COURT OF APPEAL FOR ONTARIO

DATE: 20190527
DOCKET: M50442

van Rensburg J.A. (Motions Judge)

BETWEEN

Zeifman Partners Inc.,
in its capacity as receiver of the property
known municipally as 40 Park Lane Circle

Plaintiff (Responding Party)

and

David Aiello

Defendant (Moving Party)

Sean Dewart and Mathieu Bélanger, for the moving party

Stephanie De Caria, for the responding party

Heard and released orally: May 24, 2019

REASONS FOR DECISION

[1] This is a motion to extend time to deliver a notice of appeal. The appeal is from the order of Dietrich J., dated March 15, 2019, dismissing a motion by the moving party to set aside a default judgment. Due to the inadvertence of counsel (not Mr. Dewart), the notice of appeal was served one day late, 31 days rather than

30 days after the order under appeal. The respondent refused to consent to the late service of the notice of appeal, and opposes the motion.

[2] The point of departure is that, pursuant to r. 3.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, any time limit prescribed by the *Rules* may be extended on such terms as are just. The factors to be considered in deciding whether to extend time to appeal are: (1) whether the proposed appellant had a *bona fide* intention to appeal within the prescribed period; (2) the length of and explanation for the appellant's delay; (3) any prejudice to the respondent from the granting of an extension of time; (4) the merits of the proposed appeal; and (5) whether the justice of the case requires an extension of time. At the stage of considering the justice of the case, the court must consider all of the preceding factors as well as any others that may be relevant, and balance those factors: *Denomme v. McArthur*, 2013 ONCA 694, 26 R.F.L. (7th), at para. 7; *Derakhshan v. Narula*, 2018 ONCA 658, at para. 20.

[3] With respect to the first two factors, the respondent makes no argument. The extension requested is one day. The respondent acknowledges that there was always a *bona fide* intention to appeal and that the one-day delay has been explained. I note that if the notice of appeal had been served and filed one day earlier, the appeal would have proceeded in the normal course. The moving party has a right to appeal; this is not a case where leave to appeal is required.

[4] The respondent essentially makes three arguments in opposition to the motion. First, the respondent argues that it would suffer prejudice if the extension were granted and the appeal were permitted to proceed. In the context of its prejudice argument, the respondent makes a second argument – that Mr. Aiello’s pattern of breaches of court orders in the litigation is a factor that disentitles him from pursuing an appeal to this court. Finally, the respondent says that the extension should not be granted because the proposed appeal lacks merit.

[5] On the question of prejudice, the respondent relies on the time and costs associated with continued litigation that would prejudice the financial positions of the underlying creditors in the receivership proceeding, and the risk that the receiver will not recover the judgment or costs awarded or any future costs awarded, given that Mr. Aiello is not a resident of Canada.

[6] In any case where a party to litigation seeks an indulgence from the court, a primary consideration must be whether any prejudice would result from the granting of the indulgence. In this case, what is relevant is not the prejudice that would be caused by the progress of the appeal itself, which the moving party had a right to pursue if he had complied with the 30-day time limit for serving his notice of appeal, but the prejudice resulting from the one-day delay in filing the notice of appeal: *Derakhshan*, at para. 17. Looked at in this way, there is clearly no merit to the prejudice argument.

[7] As for the moving party's pattern of conduct in the litigation, including the numerous breaches of court orders referred to in the respondent's materials, I am not persuaded that this factors into the decision I have to make. The respondent was effective in obtaining orders in respect of the earlier defaults, including orders for costs, which have been paid. The only outstanding and relevant default is the one-day delay in serving the notice of appeal, a circumstance, as explained, that was not the fault of the appellant personally.

[8] Turning to the merits of the proposed appeal, the question is only whether there is "so little merit in the proposed appeal that the appellant should be denied [his] important right of appeal": *Duca Community Credit Union Ltd. v. Giovannoli* (2001), 142 O.A.C. 146 (C.A.), at para. 14. Even where it is difficult to see the merits of a proposed appeal, a party is entitled to appeal and should not be deprived of that entitlement where there is no real prejudice to the other side: *Denomme*, at para. 10; *Auciello v. Mahadeo*, 2016 ONCA 414, at para.14.

[9] The respondent filed five volumes of materials in response to the motion for an extension of time, and both counsel devoted the bulk of their factums to arguing the merits not only of the appeal, but also of the underlying motion and litigation. In my view, this was entirely unnecessary in the circumstances of this case. Compelling merits may tip the balance in favour of an extension of time in cases where other factors may militate against extending time: *Howard v. Martin*, 2014 ONCA 309, 42 R.F.L. (7th) 47, at para. 36. In such cases, more time may be

devoted to the merits of the proposed appeal in arguing a motion for an extension. In general, however, motions to extend time to appeal to this court should not devolve into a full argument on the merits of the appeal or the litigation as a whole. It is not the place of a single judge on a motion to extend time, to consider the full merits of an appeal that only a panel of the court would have the authority to determine. It is sufficient to say in this case that even a cursory review of the notice of appeal and reasons for judgment make it clear that the proposed appeal is not so completely devoid of merit that the appellant should be denied his important right of appeal.

[10] In the circumstances, therefore, I am satisfied that the interest of justice can only be served by extending the time to appeal.

[11] The time for service and filing of the notice of appeal is extended to June 3, 2019. Costs to the moving party in the agreed and all-inclusive amount of \$7,500.

