

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Barbara M. Hamilton
Mr. Justice William J. Burnett
Madam Justice Janice L. leMaistre

BETWEEN:

	)	<i>G. D. Lenko and</i>
	)	<i>N. G. Thomas</i>
	)	<i>on behalf of the Appellant</i>
)	
<i>GARY D. LENKO</i>	)	<i>A. J. Ladyka</i>
	)	<i>for the Respondents</i>
	)	<i>The Government of</i>
	)	<i>Manitoba and The</i>
<i>(Plaintiff) Appellant</i>	)	<i>Manitoba Housing and</i>
	)	<i>Renewal Corporation</i>
)	
<i>- and -</i>	)	<i>W. M. Onchulenko and</i>
	)	<i>N. Masi</i>
	)	<i>for the Respondent</i>
<i>THE GOVERNMENT OF MANITOBA,</i>	)	<i>The Canada Mortgage and</i>
<i>THE MANITOBA HOUSING AND</i>	)	<i>Housing Corporation</i>
<i>RENEWAL CORPORATION, THE CITY OF</i>)	
<i>WINNIPEG and THE CANADA MORTGAGE</i>	)	<i>No appearance</i>
<i>AND HOUSING CORPORATION</i>	)	<i>for the Respondent</i>
	)	<i>The City of Winnipeg</i>
)	
<i>(Defendants) Respondents</i>	)	<i>Appeal heard and</i>
	)	<i>Decision pronounced:</i>
	)	<i>November 23, 2018</i>
)	
	)	<i>Written reasons:</i>
	)	<i>December 6, 2018</i>

On appeal from 2018 MBCA 28

HAMILTON JA (for the Court):

[1] The plaintiff appealed the order (the second order) of a chambers judge (the chambers judge) dismissing his application to stay or vary the order (the first order) of another chambers judge. The first order required the plaintiff to pay security for costs (\$2,000 in total) before he can proceed with his appeal of the summary judgment dismissing his claims against the Government of Manitoba (MB), the Manitoba Housing and Renewal Corporation (MHRC) and the Canada Mortgage and Housing Corporation (CMHC) (collectively, the defendants).

[2] At the appeal hearing, we dismissed the plaintiff's appeal with brief reasons to follow. These are those reasons.

[3] The first order stayed the plaintiff's appeal pending the payment of security for costs and stated that if the costs were not paid within 90 days, the plaintiff's appeal would be dismissed. The first order also permitted the plaintiff to make an application to "this Court prior to the end of the 90 day period regarding the dismissal".

[4] The plaintiff did not appeal the first order and he did not pay the security for costs within the 90 days.

[5] By his motion heard by the chambers judge, he sought an extension of time to pay the security for costs.

[6] Notwithstanding the fact that the plaintiff did not appeal the first order, he argued that the first order raises an issue of the jurisdiction of the chambers judge to order that his appeal be dismissed for non-payment of the

security for costs. He pointed to sections 7(1) and 8 of *The Court of Appeal Act*, CCSM c C240. He said that the dismissal of an appeal is only within the jurisdiction of a panel of the Court. He relies on *PricewaterhouseCoopers Inc v Ramdath*, 2018 MBCA 41.

[7] The plaintiff asked that the first order and the second order be set aside and that his appeal be set down.

[8] The defendants argued that the appeal of the second order should be dismissed for two reasons. First, the plaintiff did not appeal the first order and it is not before the Court on this appeal and, in any event, the dismissal contemplated by the first order is a matter of procedure and not substance. Second, the second order is a discretionary order which is entitled to deference.

[9] The chambers judge understood the protracted procedural background of the plaintiff's claim against the defendants. She noted that the plaintiff has not paid any amount towards the security for costs; he does not know when he will do so; "has also not paid any money toward the \$13,312.50 in costs he currently owes to CMHC" (at para 8); and has refused to attend three scheduled examinations in aid of execution arranged by CMHC. She concluded that (at para 9):

[The plaintiff] has not shown good faith regarding [the first order] . . . He has not attempted to make even a nominal payment toward the order nor has he offered any reasonable payment schedule to pay the order. Simply put, he cannot indicate when he would be able to satisfy the order.

[10] We agreed with the defendants that the appeal should be dismissed. The second order is a discretionary order. The chambers judge made no error in principle or a palpable and overriding error of fact and the second order is not unjust. Accordingly, the second order is entitled to deference (see *Brandt v Brandt*, 2000 MBCA 46 at para 4). As well, we thought it prudent and just that we also address the dismissal of the plaintiff's claim for his non-payment of security for costs by giving effect to the intention of the first order that the plaintiff not be entitled to proceed with his appeal in the event he does not pay the security for costs within 90 days (see section 8 of *The Court of Appeal Act*).

[11] One final comment. Three days before the appeal hearing, the plaintiff contacted the court registry office requesting an adjournment of the appeal so that he could retain counsel. The defendants opposed the request. The parties spoke to the plaintiff's request at the appeal hearing. We denied the adjournment. In our view, the request was unreasonable in the circumstances, given the plaintiff has not had counsel throughout the protracted proceedings to date; the lateness of the plaintiff's request; and the lack of information as to any meaningful efforts on his part to retain counsel.

[12] Therefore, the appeal of the second order was dismissed and the plaintiff's appeal was dismissed. We awarded costs against the plaintiff in the amount of \$1,000, inclusive of disbursements in favour of MB and MHRC; and \$1,000, inclusive of disbursements in favour of CMHC.

Hamilton JA

Burnett JA

leMaistre JA
