In the Court of Appeal of Alberta

Citation: Lavoie v Lukiw, 2025 ABCA 377

Date: 20251119
Docket: 2403-0266AC
Registry: Edmonton

Between:

Noel Lavoie

Respondent

- and -

Michael Lukiw

Appellant

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice Alice Woolley
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice D. Lee
Dated the 11th day of September, 2024
Filed on the 3rd day of October, 2024
(Docket: 2303 16057)

Memorandum of Judgment

The Court:

[1] The appellant Michael Lukiw appeals a decision granting the respondent Noel Lavoie summary judgment against him. He argues he did not receive proper notice of the application for summary judgment.

[2] On September 6, 2023, the respondent filed a statement of claim seeking damages and injunctive relief against the appellant for defamation and harassment. The respondent served the claim on the appellant by process server. On October 5, 2023, the appellant filed a statement of defence, providing an email address as his address for service.

[3] On December 20, 2023, the respondent filed an application for summary judgment. According to new evidence the respondent seeks to adduce on appeal, counsel for the respondent sent a filed copy of the application by email to the email address the appellant had listed for service on his statement of defence. The appellant acknowledges counsel "attempted to serve the application" using that email address. The new evidence is admitted for the limited purpose of confirming that acknowledgment.

[4] On September 11, 2024, the application for summary judgment proceeded before the chambers judge. The appellant did not attend. The chambers judge granted the application for summary judgment, awarding the respondent $100,000 in damages, and directing that an existing restraining order against the appellant be continued.

[5] The appellant appeals the chambers judge's decision, arguing he did not receive notice of the application for summary judgment. He submits counsel for the respondent knew the email address he had provided for service was no longer accessible, and asserts personal service was required in the circumstances.

[6] The appellant's appeal is premature.

[7] Rule 9.15(1) of the *Alberta Rules of Court*, Alta Reg 124/2010 allows an applicant to request that the court "set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made (a) without notice to one or more affected persons, or (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing". An application under Rule 9.15(1) must be brought within twenty days after the earlier of the disputed order having been served on the applicant and the date the order first came to the applicant's attention, although the time for filing

may be extended: Rule 9.15(2). Unless otherwise ordered, the application under Rule 9.15 must be decided by the judge who made the disputed order: Rule 9.16.

[8] The appellant's position is that he received no or insufficient notice of the summary judgment application. He has not, however, brought an application pursuant to Rule 9.15(1) to have the order for summary judgment set aside.

[9] Absent exceptional circumstances, the appropriate forum to address the appellant's allegation of insufficient service is through a review application under Rule 9.15(1), not an appeal to this Court: *Secure 2013 Group Inc v Tiger Calcium Services Inc*, 2017 ABCA 316 at para 54; *Kumar v Kumari*, 2023 ABCA 306 at para 10 [*Kumar*]; *Tornqvist v Shenner*, 2024 ABCA 285 at para 38 [*Tornqvist*]; *Stewart v Sauer*, 2025 ABCA 305 at para 15 [*Stewart*]. As a general policy, appeals should be discouraged where there is an available remedy in the court below: *Wruth v Wilson*, 2018 ABCA 181 at para 7; *Canadian Broadcasting Corp v Manitoba*, 2021 SCC 33 at para 98.

[10] In addition, an "appeal is not the preferable forum for the initial assessment of evidence", which is typically necessary where insufficient notice is asserted: *Kumar* at para 10. The respondent in this case seeks to introduce fresh evidence. As contemplated by the the requirement in Rule 9.16, that the application for relief be made to the judge who granted the initial order, the judge who issued the order in question is typically "best placed to consider evidence and determine whether the order should be set aside or varied due to the litigant's non-attendance": *Stewart* at para 15.

[11] We acknowledge the twenty day time limit set out in Rule 9.15(2) has expired. However, that Rule also gives the court below discretion to extend that time limit if appropriate. Prior decisions of this Court have treated appeals as premature despite the expiry of the twenty day time limit: see, e.g, *Tornqvist.*

[12] The appeal is dismissed.

[13] Rule 9.4(2)(c) is invoked, and the Court will prepare the resulting order.

Appeal heard on November 6, 2025

Memorandum filed at Edmonton, Alberta
this 19th day of November, 2025

Feehan J.A.

Woolley J.A.

Feth J.A.

Appearances:

B.J. Ferland
for the Respondent

Appellant M. Lukiw