In the Court of Appeal of Alberta

Citation: Pearson v Pearson, 2020 ABCA 260

Date: 20200707
Docket: 2003-0019-AC
Registry: Edmonton

Between:

Chrystal Marie Pearson

Respondent
(Plaintiff)

- and -

Kelvin Lloyd Pearson

Appellant
(Defendant)

The Court:

The Honourable Chief Justice Catherine Fraser
The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Michelle Crighton

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice G.R. Fraser
Dated the 18th day of December, 2019
Filed the 20th day of December, 2019

Memorandum of Judgment

I. Introduction

[1] Kelvin Pearson appeals an order enforcing an arbitration award under the *Arbitration Act*, RSA 2000, c A-43 [*Act*]. He asserts the chambers judge erred in denying his request to adjourn the application by the respondent, Chrystal Pearson, that resulted in the order under appeal.

II. Background

[2] The parties sought mediation and arbitration to resolve spousal support and division of matrimonial property. Following a mediation/arbitration session, they agreed on the matrimonial property division and the terms were incorporated into a Consent Arbitration Award issued August 7, 2019 (corrigendum August 30, 2019) (Matrimonial Property Award).

[3] However, the issue of spousal support was remitted to arbitration July 31, 2019, leading to a spousal support award on August 30, 2019 (corrigendum issued September 13, 2019) (Spousal Support Award).

[4] After the Spousal Support Award, Mr. Pearson sought an opinion from a new lawyer (New Counsel) who wrote to Mr. Pearson's then counsel (Former Counsel) on October 2, 2019 asking for Mr. Pearson's file.

[5] On October 3, 2019, Ms. Pearson's counsel contacted Former Counsel by email and advised that Mr. Pearson had defaulted on his payments under the Spousal Support Award and requested confirmation whether Former Counsel continued to act for Mr. Pearson.

[6] On October 4, 2019, Former Counsel emailed she was "at a standstill at the moment" and that she had forwarded the email to Mr. Pearson.

[7] By letter dated October 9, 2019, Former Counsel forwarded Mr. Pearson's file to New Counsel "on the express trust condition that the file not be used to represent Mr. Pearson without my written consent, as we have a solicitor's lien on the file".

[8] On or around October 13, 2019, the limitation period to appeal the Spousal Support Award expired. Mr. Pearson did not file an appeal.

[9] On October 24, 2019, Ms. Pearson's counsel again requested confirmation whether Former Counsel continued to act for Mr. Pearson and whether she had instructions to sign the Judgments incorporating both the Matrimonial Property Award and the Spousal Support Award.

[10] Former Counsel served Mr. Pearson with a Notice of Withdrawal of Lawyer of Record (Notice of Withdrawal) on November 20, 2019 by email in accordance with the terms of Mr. Pearson's retainer agreement with Former Counsel.

[11] The following day, November 21, 2019, Former Counsel filed the Notice of Withdrawal with the Clerk of the Court. It was then served on Ms. Pearson's counsel on November 29, 2019 and an Affidavit of Service to that effect was filed December 2, 2019.

[12] On November 22, 2019, Ms. Pearson filed an application and supporting documents (collectively the Application), returnable December 18, 2019, seeking a court order to confirm the terms of the Matrimonial Property Award, enforce the Spousal Support Award and allow Ms. Pearson to apply for a divorce judgment based on the Spousal Support Award.

[13] Former Counsel was also served with the Application on November 22, 2019 and she emailed it that same day to Mr. Pearson.

[14] Mr. Pearson emailed the Application to New Counsel on November 25, 2019.

[15] It was not until December 16, 2019, two days before the Application was to be heard, that New Counsel sent a lengthy email to Former Counsel as well as Ms. Pearson's counsel explaining that he wished to represent Mr. Pearson and appeal the arbitration award notwithstanding that the appeal period under the *Act* may have passed. He sought a release of the trust condition, noting that he had obtained from Mr. Pearson the money needed to remove the solicitor's lien.

[16] This was followed by a further email the next day, December 17, 2019, requesting an adjournment of the December 18, 2019 Application to allow Former Counsel to respond to the solicitor's lien issue.

[17] Ms. Pearson's counsel responded on December 17, 2019 at 9:47 am that Mr. Pearson was up to date on his periodic spousal support payments and that she would consent to a brief adjournment if Mr. Pearson consented to continuing spousal support until such time as it was varied or stayed.

[18] However, later that day, at 3:10 pm, New Counsel emailed both Former Counsel and Ms. Pearson's counsel claiming he was unable to accept instructions from Mr. Pearson on account of the trust condition. He also stated he had an "unfiled Notice of Withdrawal of Lawyer of Record" and that "[i]t will be necessary to learn whether [Former Counsel] continues to act and the status of Service of the Notice." The email also added: "In the event an adjournment cannot be consented to, it seems to me the proper course would be to have Mr. Pearson attend to address the Court."

[19] Former Counsel replied to New Counsel and to Ms. Pearson's counsel at 4:16 pm that same day confirming that Mr. Pearson had been served with the Notice of Withdrawal on November 20, 2019 and Ms. Pearson's counsel was served on November 29, 2019. She also stated that she sent New Counsel the complete file on October 9, 2019, adding: "I heard nothing, despite my requests to Mr. Pearson for information, until [New Counsel]'s email of yesterday. I do not intend to attend Court. If [New Counsel] would like to, I give him limited use to my file for that purpose...."

[20] In response, New Counsel then emailed Former Counsel at 5:15 pm alleging that Former Counsel was still counsel of record. He further alleged that she had not properly withdrawn under Rule 2.29(1)(a)(ii) of the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules*] because she had failed to file the requisite Affidavit of Service on Mr. Pearson. He asserted: "You remain, arguably, Counsel of Record.... I do not feel it appropriate to take instructions at this time and cannot address the suggestion of opposing Counsel regarding a Consent adjournment on condition."

[21] On December 18, 2019, Ms. Pearson brought her Application to have the arbitration award enforced under s 49 of the *Act*. Mr. Pearson himself was not present, but his New Counsel appeared, purportedly acting as *amicus curiae*. He sought an adjournment on the grounds that Former Counsel remained counsel of record and had put Mr. Pearson in jeopardy by not attending. In his submission, New Counsel argued that time was needed to allow Former Counsel to respond to the trust condition that New Counsel asserted was preventing him from representing Mr. Pearson.

[22] For her part, Ms. Pearson's counsel pointed out that under s 49 of the *Act*, the court must give judgment enforcing an arbitration award unless certain enumerated conditions exist, none of which were present in this case.

[23] The chambers judge did not grant the adjournment request. Instead, he granted Ms. Pearson's Application to have the arbitration awards registered as orders, noting that "none of the conditions that are required to not register these are present". Costs were also ordered against Mr. Pearson in the amount of $1,500.

III. Issues on Appeal and Standard of Review

[24] Mr. Pearson alleges a breach of procedural fairness on the basis that the chambers judge denied the adjournment request.

[25] The decision to grant or refuse an adjournment request is generally entitled to deference. Appellate intervention is not warranted so long as discretion is exercised judicially and sufficient weight is given to all relevant considerations: ***Fleming v Fleming***, 2016 ABCA 88 at para 8; ***1038055 Alberta Ltd v Khatri***, 2014 ABCA 421 at para 5. However, issues of procedural fairness raise the question of whether due process was followed, an issue for which no deference is owed.

IV. Positions of the Parties

[26] While Mr. Pearson was self-represented at the time his factum was filed, his New Counsel became counsel of record prior to the hearing of this appeal.

[27] On appeal, New Counsel argued that denying the adjournment was procedurally unfair because it meant that Mr. Pearson was unable to have his position advanced. New Counsel insisted that Former Counsel remained counsel of record at the time of the application because she had failed to file with the Clerk of the Court an Affidavit of Service confirming she had served the Notice of Withdrawal on *Mr. Pearson*. According to New Counsel, Mr. Pearson was therefore unable to represent himself in light of Rule 2.24(2) of the *Rules*, while he, as New Counsel, was equally unable to represent Mr. Pearson on account of the trust condition. New Counsel asked that the order be set aside as well as the costs award.

[28] Ms. Pearson's counsel maintained that the chambers judge properly exercised his discretion in denying the adjournment request. Mr. Pearson was not precluded by Rule 2.24(2) from representing himself, she contended, nor was his New Counsel unable to represent Mr. Pearson in light of the permission given by Former Counsel. Ms. Pearson's counsel further submitted that the decision to deny the adjournment was based on knowledge of all the facts and did not prejudice Mr. Pearson. Specifically, the Application was said to be procedural in nature in that s 49 of the *Act* mandates enforcement of the arbitration award in these circumstances. Ms. Pearson's counsel also submitted that the costs award was reasonable.

V. Analysis

[29] We have concluded that, in all the circumstances, there was no procedural unfairness in the chambers judge's refusal to grant an adjournment. This conclusion rests on five reasons.

[30] First, nothing prevented New Counsel from consenting to the adjournment. Taking such instructions from Mr. Pearson would have required no use of the file (i.e., the trust condition). The "no use" trust condition had not apparently prevented New Counsel from offering a second opinion about a possible appeal of the Spousal Support Award. Further, all relevant materials were attached to Ms. Pearson's affidavit as exhibits and could thus not be said to form part of Former Counsel's file.

[31] In any event, Former Counsel had given New Counsel "limited use" of the file for purposes of the Application. Before us, New Counsel argued that he was not certain what Former Counsel meant by this phrase. It is important to place these events in context. New Counsel emailed Former Counsel at 3:10 pm on December 17, *the day before* the Application, asserting he could not accept instructions from Mr. Pearson because of the trust condition. He advised he possessed an unfiled and undated Notice of Withdrawal. He then stated: "It will be necessary to learn whether [Former Counsel] continues to act and the status of Service of the Notice." As noted, this record reveals that the Notice of Withdrawal was served on Mr. Pearson on November 20, 2019 and filed with the Clerk of the Court on November 21, 2019.

[32] Former Counsel replied shortly thereafter at 4:16 pm on December 17 confirming: "I do not intend to attend Court. If [New Counsel] would like to, *I give him limited use to my file for that*

purpose, although I understood [Ms. Pearson's counsel] had agreed to a 'short adjournment'" (emphasis added). This email speaks for itself. Implicit in it is that New Counsel was authorized to use the file for the Application, separate and apart from any adjournment. In other words, it could be used to defend the Application even though Former Counsel thought Ms. Pearson's counsel had agreed to an adjournment.

[33] Second, if there were any confusion as to what New Counsel could, and could not, agree to, there was nothing to prevent Mr. Pearson from appearing personally on the morning of the Application.

[34] Mr. Pearson knew his Former Counsel was no longer acting for him on this matter. He was put on notice she had ceased to act for him when he received the Notice of Withdrawal on November 20, 2019. He does not deny this; indeed, he admits having received that Notice of Withdrawal. Further, were there any doubt that Former Counsel was not acting for Mr. Pearson on the Application or indeed at all, Former Counsel had confirmed to New Counsel and Ms. Pearson's counsel in her email sent December 17th at 4:16 pm that she would not be appearing at the hearing of the Application the next morning.

[35] New Counsel himself had recognized in his email of December 17th at 3:10 pm to both Former Counsel and Ms. Pearson's counsel that, if an adjournment could not be consented to, "the proper course would be to have Mr. Pearson attend to address the Court." But Mr. Pearson did not appear on the morning of the Application. We were told in oral argument that Mr. Pearson had important business to attend to that morning. That was his choice. Had he appeared, he could have asked to represent himself before the chambers judge and consented to the reasonable terms requested for the adjournment. Rule 2.24(2) allows for that very option. That did not happen.

[36] Third, there was nothing to prevent New Counsel from acting for Mr. Pearson and filing a notice of change in Mr. Pearson's lawyer of record. Mr. Pearson and New Counsel were aware that Former Counsel had served the Notice of Withdrawal on Mr. Pearson. The Notice of Withdrawal had also been filed and served on Ms. Pearson's counsel. The court record is clear on these points.

[37] New Counsel sought to rely on the fact that Former Counsel did not file an Affidavit of Service confirming that she had served the Notice of Withdrawal on her client. Accordingly, New Counsel asserted that given Rule 2.29(1)(a)(ii), Former Counsel remained counsel of record. But that ignores the fact there was nothing preventing New Counsel from filing a notice of change of Mr. Pearson's lawyer of record under Rule 2.28. New Counsel had a solicitor-client relationship with Mr. Pearson, having been retained to provide a second opinion regarding the Arbitration Awards long before the Application.

[38] The key to ceasing to act is that: (1) the client must know that the lawyer has ceased to act and that the client is now on his or her own; and (2) the opposing lawyer must also know because the opposing lawyer is not entitled to communicate with a represented client, and 10 days after the lawyer ceases to act, the address for service is no longer effective: Rule 2.29(1) and (2). When a lawyer serves a client with a Notice of Withdrawal of Lawyer of Record, the affidavits of service should be filed in accordance with the *Rules*. The Court must know who is on the record. The

departing counsel will want to file it to ensure that his or her offices are no longer an address for service: Rule 2.30. But the failure to attend to this paperwork does not mean a new lawyer cannot act. In fact, a new lawyer should file a notice of change of the new client's lawyer of record in

which case the notice of ceasing to act and the affidavit of service are unnecessary. Rule 2.28 does not require a notice of ceasing to act when a notice of change in the lawyer of record is filed.

[39] There were apparently unresolved fee issues between Mr. Pearson and his Former Counsel. But ongoing issues relating to a former lawyer's unpaid fees do not preclude a new lawyer from agreeing to act for the client, accepting a retainer from the client, or filing a notice of change of the client's lawyer of record. What use may be made of a former lawyer's file and the former lawyer's unpaid fee are separate issues. Moreover, those issues do not involve the opposing party. Opposing parties ought not to be held hostage to the time frame the other party requires, or takes, to sort out issues relating to replacement of counsel.

[40] Fourth, New Counsel did make representations to the chambers judge on Mr. Pearson's behalf. While he advised that he was doing so as "amicus", New Counsel acted as an advocate for Mr. Pearson, not as a friend of the court. He explained to the chambers judge that he did not know what the Former Counsel meant by "limited use" of the file for the Application. He also raised the issue of what Former Counsel's position was on the solicitor's lien and said that Former Counsel should be given a chance to respond and provide her position on the "trust condition". None of this involved Ms. Pearson.

[41] New Counsel then went on to address the substantive merits of the condition on which Ms. Pearson's counsel had agreed to consent to adjournment of the Application, namely that Mr. Pearson agree to make the payments under the Spousal Support Award until varied or stayed. In New Counsel's view, this condition was "unreasonable". In particular, he stated: "My friend contacted me yesterday because she and I have been in communication, and she said unreasonably we'll agree to the adjournment if you will make sure that spousal support is paid until the next date." Then, after stating he could not take those instructions, New Counsel went on to argue why the request that spousal support continue until terminated or varied was unreasonable in his view, stating: "She has indicated that her client is wholly dependant on spousal support. My Lord, in the last two months, my friend's client has received $800,000."

[42] When Ms. Pearson's counsel objected that New Counsel had moved into the merits of the property award, New Counsel then returned to the argument that Former Counsel should have been there and she should be compelled to attend.

[43] The chambers judge was therefore well aware that while New Counsel took the position he could not accept instructions from Mr. Pearson, New Counsel had also contended that the condition on which Ms. Pearson's counsel would consent to an adjournment was "unreasonable". However, Mr. Pearson's interests were not the sole consideration before the chambers judge. Even though Mr. Pearson had brought the arrears in the payments up to date, the chambers judge was required to consider and weigh the prejudice to Ms. Pearson were Mr. Pearson to again default on his spousal support obligations.

[44] Fifth, in any event, nothing on this record suggests that Mr. Pearson suffered any prejudice from the adjournment being denied. That is, there was no reason to think the outcome would have been different had an adjournment been granted. That is because s 49 of the *Act* mandates the enforcement of an arbitration award in circumstances where, as here, none of the enumerated conditions are present. The most that someone acting on Mr. Pearson's behalf could have done is seek a stay, a remedy available for orders enforced under s 49(3) by virtue of s 49(8): ***Subway Franchise Systems of Canada, Ltd. v Esmail***, 2005 ABCA 350; ***Comeau v Comeau***, 2011 ABQB 69. However, Mr. Pearson's only grounds for such a remedy would have been his desire to appeal the arbitration award, which was out of time prior to the Application. Section 46(1)(a) of the *Act* requires that an appeal be commenced within 30 days, a time limit the court has no jurisdiction to extend: ***Allen v Renouf***, 2019 ABCA 250.

[45] New Counsel asserted in oral argument that the basis for challenging the arbitration award was that there were mathematical and other errors in the Spousal Support Award which Mr. Pearson discovered after checking with his Human Resources Department and Revenue Canada following the issuance of the Spousal Support Award. However, none of these alleged errors were put before the chambers judge. Nor can it be suggested that Mr. Pearson was precluded from doing so based on the non-use of his file since, on this record, these alleged errors in the Spousal Support Award would not have been on the file. In other words, Mr. Pearson did not file a reply affidavit.

[46] Finally, there is no indication that anything pertinent was withheld from the chambers judge who made a decision to deny the adjournment request based on all the relevant facts known at the time.

[47] For these reasons, having regard to all the circumstances, there was nothing procedurally unfair about the decision of the chambers judge to deny the adjournment request.

VI. Conclusion

[48] The appeal is dismissed.

Appeal heard on June 1, 2020

Memorandum filed at Edmonton, Alberta
this 7th day of July, 2020

_____
Fraser C.J.A.

_____
Wakeling J.A.

_____

Authorized to sign for: Crighton J.A.

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