Court of Queen's Bench of Alberta

Citation: 866546 Alberta Ltd v Skene, 2018 ABQB 825

Date: 20180925
Docket: 0201 06979
Registry: Calgary

Between:

866546 Alberta Ltd. and 592422 Alberta Ltd.

Plaintiff

- and -

David G.K. Skene and Sandy L. Skene

Defendant
(Plaintiffs by Counterclaim)

- and -

Gerald E. Masuch, Gerald R. Albert and Carole A. Neale, Gerald E. Masuch, Gerald R. Albert and Carole A. Neale Carrying on Business Under the Name and Style of "Masuch, Albert & Neale" and the Said Gerald E. Masuch, Gerald R. Albert and Carole A. Neale
Defendants by Counterclaim

Reasons for Decision
of
J.T. Prowse, Master, Court of Queen's Bench of Alberta

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[1] This action involves a counterclaim brought by the defendants (referred to as the "Skenes") against the law firm of Masuch, Albert and Neale ("Masuch").

[2] The original action against the Skenes was discontinued, but their counterclaim against Masuch has been underway for 16 years.

[3] Masuch applies to dismiss the counterclaim for delay, both under Rule 4.33 (the 3 year 'drop dead' rule) and under Rule 4.31 (the prejudicial delay rule).

[4] For the reasons which follow I am dismissing the counterclaim under both Rules.

Chronology

[5] A chronology is set out below. The details are important to evaluate the Skene's position that their efforts at achieving a subdivision of the 1/3 acre parcel in question constituted a significant advance in the counterclaim.

[6] As will be seen from the correspondence described below, there were two standstill periods: one commencing December 10, 2009 and ending at the end of March 2010, and the second commencing January 19, 2012 and ending November 13, 2015.

- April 9, 2000 – the Skenes entered it an agreement with Caleron Properties Ltd. ("Caleron") pursuant to which Caleron agreed to purchase the "Calgary Lands" from the Skenes. Caleron was to subdivide a 1/3 acre parcel from the Calgary Lands and convey it back to the Skenes. That subdivision has not happened to date, more than 18 years later.

  The agreement provided that, if the subdivision did not occur by April 30, 2000, then Caleron would lease the 1/3 acre parcel to the Skenes for 20 years. Caleron also agreed to guarantee financing to enable the Skenes to purchase the "Okotoks Lands".

- June 1, 2000 – Caleron transferred its interest to two number corporations ("Numbercos"). The Numbercos were unable to subdivide the 1/3 acre parcel, so they honored Caleron's agreement to lease it to the Skenes for 20 years. In addition, the guarantee of financing which had been offered to enable the Skenes to purchase the Okotoks lands did not work out. Instead the Numbercos lent $135,000 to the Skenes in order to allow the Skene's to finance the purchase of the Okotoks Lands. The Numbercos secured that loan with a second mortgage against the Okotoks Lands. The term of that second mortgage loan was 18 months which the Skenes say was far too short.

  The Skenes assert that Masuch acted as their lawyers with respect to the foregoing transactions.

- May 2, 2002 – Numbercos commenced a foreclosure action against the Skenes with respect to the second mortgage on the Okotoks Lands, which had matured and become repayable in full.

- May 27, 2002 – The Skenes filed a statement of defence to the foreclosure, and a counterclaim against Masuch.

> The counterclaim asserts that Masuch breached its duty to the Skenes, amongst other things, by acting in a conflict of interest and by recommending that the Okotoks mortgage have a term of 18 months, when it should have matured only when the Numbercos succeeded in subdividing and transferring the 1/3 acre parcel to the Skenes.

- 2002 to 2009 – the foreclosure action against the Skenes was discontinued when the Skenes redeemed the Numbercos mortgage, but litigation on the counterclaim proceeded, at a fairly leisurely pace, until the counterclaim was ready to be set down for trial in 2009.
- August of 2009 – by now the Calgary Lands had been transferred from the Numbercos to Sukhwant Shergill ("Shergill"). She disavowed the obligation to subdivide the 1/3 acre parcel and convey it to the Skenes, and she disavowed the 20 year lease. She brought an Originating Notice (Action No. 0901-12151) to discharge the caveat which the Skenes had filed against the Calgary Lands (the "Shergill Action")
- December 10, 2009 – the lawyer for Masuch, Mr. Gilborn, wrote to the lawyer for the Skenes, Mr. Sattin, as follows:

  > I am currently seeking instructions from my client in respect of the Certificate of Readiness issue [to set the counterclaim down for trial] that we have also discussed on December 9 and will advise in due course ...

- December 18, 2009 – Mr. Gilborn again wrote to Mr. Sattin as follows:

  > Further to our discussion after the conclusion of the cross-examination of Mrs. Shergill, I have now had an opportunity to obtain instructions from my clients in respect to your suggestion that the entry of the Certificate of Readiness in the action involving our respective clients be postponed pending your clients efforts to force the current owner [Mrs. Shergill] to proceed with subdivision. My clients have indicated they are prepared to voluntarily stand down in their efforts to proceed with the entry for trial [of the counterclaim] for a limited period of time, depending on the progress your clients make and efforts they ... we have instructions not to take further steps with respect of the entry of the Certificate of Readiness prior to the end March 2010 ...

- March 11, 2010 – Mr. Gilborn wrote to Mr. Sattin as follows:

  > I will of course be reporting to my client concerning the current status of the matter and seeking

> instructions in respect of our position in the main litigation between the law firms and the Skenes

- February 23, 2011 – Mr. Gilborn actively participates in the Shergill Action by providing on this date an affidavit supportive of the Skenes' position from Mr. Gerald Masuch.
- May 16, 2011 – in a decision issued in the Shergill action on this date (reported at 2011 ABQB 334, 2011CarswellAlta 877), I noted that Mrs. Shergill had abandoned the Shergill Action, and ruled that she could not thereafter challenge the Skenes' caveat against the Calgary Lands in any future proceedings based on grounds which were available to her on May 16, 2011.
- January 9, 2012 – Mr. Sattin wrote to Mr. Gilborn as follows:

> ... In the past the action between our clients and your clients has been in abeyance pending resolution of the matters with Shergill. Given that this matter could possibly go on for several more months, your continued co-operation in holding [the counterclaim] in abeyance would be appreciated ...

- January 11, 2012 - Mr. Gilborn wrote to Mr. Sattin and stated:

> Thank you for your letter of January 9, 2012. I have no current instructions to take steps in regard to this matter on behalf of [Masuch]. To the extent that your clients have an obligation to pursue the matter in accordance with the requirements of the new Rules of Court, this letter should not be considered a waiver of that obligation.

- January 19, 2012 – Mr. Gilborn wrote to Mr. Sattin as follows:

> Further to our most recent correspondence, we have instructions from our client to consent to a 6-month standstill agreement concerning this matter to afford your clients a reasonable opportunity to resolve this matter with [Mrs. Shergill]

- March 1, 2012 – Mr. Gilborn wrote to Mr. Sattin and returned a signed copy of Mr. Sattin's February 29, 2012 correspondence confirming the standstill agreement. The standstill was extended from time to time.
- September 16, 2015 – Mr. Gilborn wrote to Mr. Sattin advising that he was not expecting to receive instructions to agree to a further standstill agreement and that the current standstill agreement would come to an end on November 13, 2015.

- October 13, 2015 – Mr. Sattin wrote to Mr. Gilborn advising that the he had retired and that the matter was being handled by Tim Boyle at his former firm.
- October 14, 2015 – Mr. Gilborn emailed Mr. Boyle suggesting that the Skenes would likely need to complete a supplementary affidavit of records [in the counterclaim action] disclosing what had been happening with the subdivision application.
- November 3, 2015 – Mr. Gilborn wrote to Mr. Boyle seeking information as to the current status of the subdivision application.
- December 29, 2015 – Mr. Gilborn wrote to Mr. Boyle seeking an answer to his previous letter looking for advice regarding the subdivision application.
- March 14, 2016 – Mr. Gilborn wrote to Mr. Boyle seeking an answer to his letters of November 3, 2015 and December 29, 2015.
- September 27, 2016 – Mr. Boyle wrote to Mr. Gilborn advising that the Skenes action against Mrs. Shergill (to enforce subdivision and transfer of the 1/3 acre parcel) was being held in abeyance while subdivision was being pursued. No particulars of the status of the subdivision process were provided. Mr. Boyle also enquired what Mr. Gilborn's position was with respect to when the 3 year drop dead period would commence running.
- October 25, 2016 – Mr. Gilborn advises that his view was that the 3 year drop dead period would comprise periods of delay both prior to and subsequent to the period covered by the standstill agreement.
- June of 2017 – during the Skenes' negotiations with Mrs. Shergill they became aware that the minimum lot size was 2 acres, which would defeat their attempts to subdivide a 1/3 acre parcel. The Skenes were able to organize the adjacent law owners to sign a joint request to the City to amend the Area Structure Plan ("ASP") to allow for smaller parcels. In June of 2017 the Skenes were successful in having the ASP amended. Since that time the Skenes have continued pursuing subdivision of the Calgary Lands.

The 3 year drop dead period

[7] Assume the following hypothetical:

(a) there is a one year period of delay

(b) then a standstill lasts 6 months

(c) then the standstill comes to an end, and steps in the action begin again

[8] There are three ways to calculate the 3 year period under Rule 4.33:

(i) start from the beginning of the delay period (a) so that in another 18 months you arrive at the 3 years.

(ii) count period (a) only, then begin again at period (c), so that in another 2 years you arrive at the 3 years.

(iii) ignore the delay prior to the standstill and begin at (c), so that in another 3 years you arrive at the 3 years.

[9] If the parties word the standstill to make it clear which of these three outcomes they intend, then the outcome will be as agreed.

[10] If the parties do not address this topic in a way which makes their choice clear, in my view outcome (ii) applies. In other words, one adds up the delay prior to and after the standstill to arrive at 3 years. This outcome is supported by the present wording of Rule 4.33(5), which states:

> If a respondent and an applicant agree in writing to a suspension period, the period of time under subrule (2) [3 or more years] does not include the suspension period agreed to.

[11] In my view, outcome (ii) applies to this case, although I note that current Rule 4.33(5) was not in place when the standstill in question was negotiated.

[12] In this case the last significant advance in this action, even though it technically occurred in a related action, was on May 16, 2011 when I ruled that Mrs. Shergill could not take any future proceedings attacking the Skenes' caveat based on grounds which were available to her on May 16, 2011.

[13] As I agree that my ruling of May 16, 2011, was a significant advance in a sufficiently linked action, there is no need for me to rule on the assertion of the Skenes' former counsel that there was a standstill in effect until May 16, 2011 (as he puts it "until the caveat application had been heard"). I simply note that his assertion was a bald assertion, with no specifics as to when and where such a standstill was agreed to, and without relating that assertion to the numerous letters between himself and Masuch's counsel dealing specifically with the topic of standstills.

[14] There was then no significant advance for the next 254 days (starting May 16, 2011) until January 19, 2012, when the second standstill period was agreed to. That second standstill lasted until November 13, 2015.

[15] Was there any significant advance in the action between November 13, 2015 and March 2, 2017 [calculated at 3 years less 254 days]?

[16] All that the Skenes can point to is their continued efforts at subdivision. Unfortunately for the Skenes, these efforts were unsuccessful. They were carried on without any participation by, or information being provided to Masuch, despite the requests for information being made by Mr. Gilborn as counsel to Masuch. Those requests for information are detailed in the chronology outlined above.

[17] In ***Huerto v Canniff***, 2014 ABQB 534, 2014 CarswellAlta 1535 at para 22 (appeal dismissed at 2015 ABCA 316, 2015 CarswellAlta 1900) the Court listed the following examples of matters which do not significantly advance an action:

- commencing a step that is not then completed

- gathering information where that activity is unknown to other parties
- unsuccessful settlement negotiations

[18] In my view, the Skenes unsuccessful efforts at subdivision of the 1/3 acre parcel following November 13, 2015 are a combination of these three ingredients, and do not constitute a significant advance in the counterclaim against Masuch.

Rule 4.31 – prejudicial delay

[19] Had I not dismissed the Skenes' counterclaim pursuant to Rule 4.33, I would have dismissed it pursuant to Rule 4.31, which states:

[20] 4.31(1) If delay occurs in an action, on application the Court may

> (a) dismiss all or any part of a claim if the Court determines that the delay has resulted in significant prejudice to a party, or
>
> (b) make a procedural order or any other order provided for by these rules.
>
> (2) Where, in determining an application under this rule, the Court finds that the delay in an action is inordinate and inexcusable, that delay is presumed to have resulted in significant prejudice to the party that brought the application.

[21] The counterclaim has been underway for over 16 years. This is an inordinate delay.

[22] The only possible excuse for the delay in advancing the counterclaim was the idea of attempting to bring about the subdivision of the Calgary Lands instead of pursuing the counterclaim to trial. While that was a sensible approach when initially discussed in December of 2009, the reasonableness of this approach dissolved by the end of 2015 at the latest.

[23] Given that the delay was inordinate and inexcusable, the presumption of significant prejudice under Rule 4.31(2) comes into play.

[24] While the effectiveness of that presumption was perhaps called into doubt by the decision of the Alberta Court of Appeal in ***Ravvin Holdings Ltd. v Ghitter***, 2008 ABCA 208, 2008 CarswellAlta 1270 (Alta. C.A.) at para 45, the effectiveness of the presumption of prejudice was recently confirmed in ***Humpreys v Trebilcock***, 2017 ABCA 116, 2017 CarswellAlta 647 at para 149 as follows:

> We are satisfied that upon proof by the moving party of the basic fact — inordinate and inexcusable delay on a balance of probabilities — the presumed fact — significant prejudice — must be found to exist unless the nonmoving party has proven on a balance of probabilities that the moving party has not suffered significant prejudice. This conclusion adequately recognizes the seriousness of the consequences litigation delay presents in our community without depriving the nonmoving party of a reasonable opportunity to challenge this conclusion.

[25] The Masuch law firm has had allegations of professional negligence and acting in a conflict of interest hanging over its head for 16 years. The Skenes have not provided evidence sufficient to overcome the presumption of significant prejudice.

Conclusion

[26] I strike the Skenes' counterclaim for delay, both pursuant to Rule 4.33 and Rule 4.31. If the parties cannot agree on costs they may seek a ruling from me in that regard.

Heard on the 12th day of September, 2018.
Dated at the City of Calgary, Alberta this 25th day of September, 2018.

J.T. Prowse
M.C.Q.B.A.

Appearances:

Victor C. Olson
for the Plaintiff's by Counterclaim, David G.K. Skene and Sandy L. Skene

Richard J. Gilborn, Q.C.
for the Defendants by Counterclaim, Gerald E. Masuch, Gerald R. Albert and Carole A. Neale, Gerald E. Masuch, Gerald R. Albert and Carole A. Neale carrying on business under the name and style of "Masuch, Albert & Neale" and the said Gerald E. Masuch, Gerald R. Albert and Carole A. Neale