Court of Queen's Bench of Alberta

Citation: Barath v Schloss, 2015 ABQB 332

Date: 20150522
Docket: 0303 23710
Registry: Edmonton

Between:

John Barath, Alpha Prime Developments Ltd. and Full Moon Entertainment Ltd.

Appellants

- and -

Barry Schloss and Alleghany Holdings Ltd.

Respondents

Reasons for Judgment of the Honourable Mr. Justice Donald Lee

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[1] This is an appeal of the Master granted in Special Chambers on September 15, 2014 in which the Master decided pursuant to Rules 4.31, 4.33 and 15.4 of the *Alberta Rules of Court* that the Appellants' action should be dismissed for long delay. The Master concluded that the Appellants had delayed the action for over five years.

[2] The Statement of Claim in this matter was filed on December 22, 2003, and the Statement of Defence was filed on March 17, 2004. Several Court Orders were issued in this Court in 2004, and no further Orders were issued until 2008 when a Consent Order was granted between the Appellants and the Trustee in Bankruptcy of the Respondent Bar 2 Developments

Ltd. ("Bar 2") on April 2, 2008. The Trustee in Bankruptcy was directed to provide the financial records of Bar 2 to the Appellants, an application that the Respondents Barry Schloss and Alleghany Holdings Ltd. never participated in.

[3] A letter was then issued by counsel for the Appellants notifying the Respondents on May 22, 2009 that their client was "in the process of preparing an expert report in this matter". Almost four years later and just over five years since the April 2, 2008 Consent Order, on or about April 4, 2013, counsel for the Appellants delivered to counsel for the Respondents a copy of their expert report. The projects which are the subject of this law suit are residential apartment buildings which were started in or about 2000. The Respondents position is that since 2004 the only events that occurred of a material nature were the April 2, 2008 Consent Order concerning the bankrupt Bar 2 to obtain its records three years after they become bankrupt; and the delivery of expert report on April 4, 2013 more than five years after the April 2, 2008 Order and nine and one-half years after the action was commenced.

[4] The Appellants' position is the obtaining of the expert report was a "significant advance" in the legal action. Until the expert report was completed, it was difficult to determine what, if any, damages were incurred relating to the transfer of shares on October 1, 2002 "and therefore whether to continue to prosecute the legal action". It is submitted that the expert report, which estimate the value of the share as of October 1, 2002, is the pivotal issue in this law suit, moving the lawsuit closer to trial in a meaningful way. The expert report estimated the value of the shares of Bar 2 as of October 1, 2002 in between $620,000 and 1 million dollars, and its findings significantly advanced the action to trial. The expert report was prepared by firm of chartered accountants and took longer than anticipate to finalize as the initial draft report was prepared by an accountant who subsequently left the firm. The report was eventually completed at a cost of almost $41,000.

Issues

(a) Should the Court uphold the Masters decisions to dismiss the action pursuant to Rule 4.33 on the basis that three or more years passed without a significant advance in the action?

(b) Alternatively the second issue is whether the Court should exercise discretion to dismiss this action pursuant to Rule 4.31(1)(a) on the basis that there has been inordinate and inexcusable delay in the prosecution of this action that has resulted in significant prejudice to the Respondents.

Standard of Review

[5] The standard of review on an appeal from a Master to a Judge, is correctness.

Rule 4.33

[6] Rule 4.33 came into effect on November 1, 2013, and reads as follows:

> **4.33(1)** If 3 or more years has passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant, unless
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> (a) the parties to the application expressly agreed to the delay,

> (b) the action has been stayed or adjourned by order, an order has extended the time for advancing the action, or the delay is provided for in a litigation plan,
>
> (c) the applicant did not provide a substantive response within 2 months after receiving a written proposal by the respondent that the action not be advanced until more than 3 years after the last significant advance in the action, or
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> (d) an application has been filed or proceedings have been taken since the delay and the appropriate.
>
> **(3)** The following periods of time must not be considered in computing periods of time under subrule (1):
>
> (a) a period of time, not exceeding one year, between service of a statement of claim on an applicant and service of the applicant's statement of defence;
>
> (b) a period of time, not exceeding one year, between provision of a written proposal referred to in subrule (1)(c) and provision of a substantive response referred to in that subrule.
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> **(4)** Rule 13.5 does not apply to this rule.

[7] The only possible exception pursuant to Rule 4.33 that is applicable here is Rule 4.33(1)(d). The Appellants argue that the Respondents acquiesced in the delay by not bringing "their application to dismiss on a timely basis" such that Rule 4.33(1)(d) applies. Our Court of Appeal in ***Trout Lake Store Inc. v Canadian Imperial Bank of Commerce*** 2003 ABCA 259 at paragraph 33 dealt with the predecessor rule as follows:

> 33 In summary, I believe the appropriate approach on a 244.1 application to dismiss is as follows:
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> 1. The proceedings should be examined as at the date of the application to dismiss for want of prosecution pursuant to Rule 244.1.
>
> 2. If at any time in the action there has been a gap of five years or more where no "thing" has been done to materially advance the action, the judge shall examine what has occurred since that five-year gap.
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> 3. If the delaying party has not done a thing to materially advance the action since the five-year gap, the action shall be dismissed, absent agreement to the delay.
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> 4. If the delaying party has done a thing to materially advance the action after the five-year gap, and the other party objected and applied for a dismissal, the action shall be dismissed, absent any agreement to the delay.
>
> 5. If the delaying party has done a thing to materially advance the action after the five-year gap, and the applicant has participated in

> that thing, continued to participate in the action, or otherwise acquiesced in the delay, the action shall continue, and the application for dismissal refused.
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> These steps will avoid the foot race to the courthouse and it will encourage the party seeking to process its claim to proceed in an expeditious manner throughout. At the same time, it will encourage the non-delaying party to act in a timely basis and, at a minimum, to object to any further action taken by the delaying party at the first opportunity.

[8] In this regard the Appellants argue that the Respondents did not bring forward their application to dismiss until August 2014, well over a year after the expert report was served on them, and approximately five months after the Appellants had brought forward an application that the Respondents provide their Affidavits of Records to provide responses to undertakings. Therefore it is submitted by the Appellants that the Respondents did not bring forward their application to dismiss on a timely basis within the meaning of the ***Trout Lake*** decision. Furthermore the Appellants argue that the governing inquiries for the Court to look back from the date of the filing of the Notice of Motion to Dismiss in August 2014 as stated ***Filipchuk v. Ladouceur*** 2001 ABCA 26:

> 1 COSTIGAN J.A. (orally):-- The issue in this appeal is whether after five years have passed, a Plaintiff can do a thing which materially advances the action and escape the application of Rule 244.1 as long as the application to dismiss is brought less than five years after the thing was done.
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> 2 In this case, the thing was noting in default. In our view, that procedural step is a thing which materially advances the action.
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> 3 Rule 244.1 is akin to a limitation provision.
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> 4 It is possible for the rule to bear two interpretations. One interpretation is that once five years have passed the action is dead. The other interpretation is that the court looks back from the date that the notice of motion was filed and if less than five years have elapsed from the date that a thing was done which materially advances the action, the rule is not invoked.
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> 5 In our view, given the effect of the rule upon the right to litigate, the interpretation most favourable to preservation of that right should be adopted.
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> 6 Therefore, we conclude that the governing inquiry is for the court to look back from the date of the filing of the notice of motion. We note that this interpretation is consistent with the general approach taken by this court in Morasch v. Alberta (2000), 75 Alta L.R. (3d) 257 (C.A.).
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> 7 Therefore, the appeal is allowed, the Order of the Chambers Judge is vacated and the motion under Rule 244.1 is dismissed.

[9] It is clear however that this interpretation of the former Rule 244.1 stated in ***Filipchuk*** was rejected in ***Trout Lake*** at paragraph 33 when our Court of Appeal indicated that the steps they outlined there would avoid the foot race to the Courthouse. Accordingly, the five year gap is not determined by looking back five years (now three years pursuant to Rule 4.33) from the date of the filing of the motion to dismiss. Rather, the Court must view the delay pursuant to Rule

4.33 as being from the April 2, 2008 Consent Order concerning the bankrupt Bar 2, and the delivery of the expert report on April 4, 2013. I am prepared to consider that the expert report was a "significant advance" in the legal action because it allowed the parties to determine what, if any, damages were incurred relating to the transfer of the shares.

[10] The problem however, as I see it is, is that there is a significant delay between the letter dated May 22, 2009 to the Defendants solicitors advising them that the Plaintiffs were in the process of preparing an expert report, and the actual service of a copy of the expert report dated March 29, 2013 on the said solicitors for the Defendants on April 4, 2013. I agree with counsel for the Respondents in this matter that there was a gap of over five years between the April 2, 2008 Order, and the service of the expert report on April 4, 2013. Since an order for something to advance an action in a meaningful way, it requires the involvement of both parties to the litigation. Without the shared knowledge of the expert report, the parties could not make any decisions with respect to its conclusions, and the litigation therefore did not move forward in a meaningful way during this five year period. It is not enough to simply advise that an expert report is being prepared, given that the significance of the expert report only occurs on the day it was delivered to counsel for the Respondents.

[11] Since there was a delay of more than three years without a significant advancement, the Court must dismiss this action unless the Respondents had "actively participated" in the action following the three plus year delay to an extent and degree that could have led the Appellant to assume that the delay had been waived by the Respondents. I conclude that there was no such active acquiescence, even though it did take the Respondents approximately one year and four months before they filed this application to dismiss for long delay. The Respondents did not agree to the delays of the Appellants, and did not participate in any proceedings or steps since 2004, although they were aware of the application made in 2008 to obtain the records of the bankrupt, Bar 2.

Undue Delay

[12] Furthermore, the Respondents alternate application was pursuant to Rule 4.31, which is with respect to claims where there has been an undue delay that has resulted in significant prejudice. Rules 4.31 reads as follows: -

> **4.31(1)** If delay occurs in an action, on application the Court may
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> > (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.

[13] Clearly the delay from the April 2008 Order and the expert report constitutes undue delay, especially when considering that no direct orders involving the Respondents were made after 2004. The question is whether the Respondents have suffered significant prejudice as a result.

[14] With respect to prejudice, the Appellants argue that this legal action is based on records, not memories, and that there are no contractors who will be significant witnesses. It is submitted that the key issue in this case is whether the transfer of the shares on the October 1, 2002 was done on the basis that the shares were held in trust on behalf of the Plaintiff Alpha Prime. It is submitted that there are ample documentary records available, and that the Respondents have not incurred serious prejudice within the meaning of Rule 4.31.

[15] The Respondent, Barry Schloss, in his Affidavit of August 27, 2014 deposes to the following:

> 10. The projects which are the subject of this action (the "projects") are residential apartment buildings, which were started in or about 2000.
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> 11. The two persons primarily involved in the construction of the projects, John Scraba and Pressley Crawford, had come to this project through their employment by one or more of the Plaintiffs.
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> 12. I have no knowledge of the whereabouts of either Mr. Scraba or Mr. Crawford, and have no way of finding them. Mr. Crawford was originally from the United States. Their evidence would be critical to the defence of this claim, as they had alleged wrongdoing on the part of the Plaintiffs. My last contact with them was before the bankruptcy of Bar 2 in 2005. In 2005 and 2006 I received communications that caused me to contact the Edmonton Police. They attempted to locate Mr. Crawford and told me they were unable to find him.
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> 13. The dealings of Mr. Crawford and Mr. Soraba with a number of contractors on the projects are an important part of the issues n [sic] this lawsuit. With the passage of time, people involved at various contractors will have compromised or no memories of conversations with Mr. Scraba or Mr. Crawford, and records will likely no longer exist, I know that the principal of at least one of the significant contractors has died.
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> 14. With the bankruptcy of Bar 2 in 2005, I have few, if any, records left concerning the projects, and certainly very few of the records relevant to this action that existed prior to 2005.

[16] The passage of 11 years from 2004 undoubtedly compromises the availability and the quality of evidence from various contractors who are significant witnesses in this litigation. At least one of the principals of one of the significant contractors has died. While the Appellants argue that Mr. Scraba and Mr. Crawford, the key players in the work done on these projects, were readily available with respect to ongoing litigation they had with the Appellants, and therefore would likely be available if this matter proceeds to trial, these individuals have not been accessible to the Respondents, and the Respondents now have little or no documentation with respect to this matter.

[17] My decision with respect to Rule 4.31 is that there has been undue delay which has been inordinate and inexcusable. That delay is presumed to have also resulted in significant prejudice to the party that has brought the application pursuant to Rule 4.31(2). Even without that presumption, the prejudice that the Respondents have pointed out is significant enough to invoke Rule 4.31.

Conclusion

[18] The applications brought by the Respondents under Rule 4.33 and 4.31 are granted, and the appeal is dismissed, with costs.

Heard on the 14th day of January, 2015.
Dated at the City of Edmonton, Alberta this 22nd day of May, 2015.

Donald Lee
J.C.Q.B.A.

Appearances:

David F. Holt
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for the Appellants

Donald R. Cranston, Q.C.
Bennett Jones
for the Respondents