Court of Queen's Bench of Alberta

Citation: Barlot v Eisner, 2017 ABQB 636

Date 20171027
Docket 0701-00381
Registry Calgary

2017 ABQB 636 (CanLII)

Between:

Jean Barlot

Appellant

- and -

Dr. Haskel Eisner, H. Eisner Professional Corporation, Cardinal Contact Lens Inc. and Employees Jane Doe #1-5

Respondents

Decision
of the
Honourable Mr. Justice W.A. Tilleman

Appeal from the Decision by
J. Farrington, Master in Chambers
Filed on the 11th day of May, 2017
Dated the 11th day of May, 2017

Introduction

[1] This is an appeal from an order of Master Farrington dismissing an action for excessive delay.

[2] In 2007, Jean Barlot sued the defendants for negligence and breach of contract relating to the allegedly faulty prescription and manufacture of contact lenses, which he claims caused serious damage to his eyes. While the claim was begun with moderate alacrity, it soon became bogged down in delay and procedural orders until late 2013, after which time very little occurred. Counsel for Mr. Barlot have come and gone over the years, and he represented himself in this appeal and in the application appealed from.

2017 ABQB 636 (CanLII)

Facts Relevant to this Appeal

[3] On November 21, 2013, Master Mason signed a consent order compelling the parties to comply with a litigation plan. Clause 1 of this order compelled Mr. Barlot to confirm that, "any and all primary expert assessments of the Plaintiff's have been scheduled, and will advise of the nature or type of expert retained and the date of assessment," by January 15, 2014. Upon receipt of the expert reports, the defendants were to schedule any rebuttal experts within two months, and both parties were to take steps to set the matter down for trial before June 30, 2014.

[4] On January 15, 2014, Mr. Barlot's counsel wrote to opposing counsel indicating that examinations had indeed been scheduled. On April 9, 2014, Mr. Barlot's counsel emailed opposing counsel, indicating that one letter from Dr. Williams had finally been received, while another, from Dr. Demong, was outstanding. Much later, on August 8, 2014, Mr. Barlot also received an expert document review prepared by Western Medical Assessments.

[5] There is little evidence that any of these reports were served on the respondents. There is one letter from Mr. Barlot's former counsel to Mr. Barlot indicating his understanding that the Williams letter and a Demong letter were served by a previous counsel, and that the Western Medical Assessment need not be served until trial dates were set. But there is no direct corroborating evidence, either in affidavits of service or records of correspondence acknowledging receipt, that the respondents ever received either letter. The Williams letter and the document review are now on the record for the purposes of the delay application; however, the Demong letter is not and there is absolutely no evidence that it ever existed. As for the document review, both parties agree that it was recently served on the respondents after they brought the delay application. As they did not receive any reports, the defendants did not arrange for rebuttal assessments and the parties were no closer to setting trial dates in June.

[6] Finally, in October 27, 2014, Mr. Barlot's counsel sent a formal offer to settle for $75,000.00 to the defendant.

[7] On November 23, 2016, counsel for Cardinal, a co-defendant, filed an application to dismiss the action for long delay pursuant to Rules 4.31 and 4.33.

[8] On May 11, 2017, Master Farrington granted the application and dismissed the action. This is an appeal from that decision.

Law and Analysis

Standard of Review

[9] The standard of review for an appeal from a Master is correctness: ***Bahcheli v Yorkton Securities Inc***, 2012 ABCA 166 at para 30.

Section 4.33

[10] Rule 4.33 of the *Alberta Rules of Court*, Alta Reg 124/2010, insists that, "[i]f 3 or more years have passed without a significant advance in an action, the Court, on application, must dismiss the action as against the applicant."

[11] This "drop dead rule" is serious; it is not a case management tool. "It is not designed to regulate the efficient prosecution of actions, but rather to prune out actions that have truly died": ***Ursa Ventures Ltd v Edmonton (City)***, 2016 ABCA 135 at para 10. It therefore acts as a limitations period. A clock begins running after every significant action occurs, and stops three years after that date. Justification for delay is irrelevant to the Rule, and steps that are begun, but not completed do not advance an action.

[12] The *Alberta Rules* are governed by rule 1.2, which mandates that claims be pursued in a "timely and cost effective manner." Rule 4.1 also holds parties responsible for, "managing their dispute and for planning its resolution in a timely and cost-effective way."

[13] The courts must use a functional approach in interpreting and applying the Rules.

> Under the delay Rules the functional approach inquires whether the advance in an action moves the lawsuit forward in an essential way considering its nature, value, importance and quality. The genuineness and the timing of the advance in the action are also relevant. This analysis is undertaken in the context of the particular lawsuit. The focus is on substance and effect, not form: ***Ursa*** at para 19.

[14] A formulaic step which does not substantially advance any contested issue towards resolution is not a functionally significant advance. A Court must take a macro, contextual view of the action as a whole, "framed by the real issues in dispute, and viewed through a lens trained on a qualitative assessment. This necessarily involves assessing various factors including, but not limited to, the nature, value and quality, genuineness, timing, and in certain circumstances, the outcome of what occurred": ***Nash v Snow***, 2014 ABQB 355, paras 29-30.

[15] Turning to this case, the courts have decided that retaining an expert, or commissioning an expert report as Mr. Barlot has done, does not on its own constitute a significant advance. In ***Matco Investments Ltd v Dhow Properties Ltd.***, 2010 ABQB 104, Hughes, J ruled that, "the retention of an expert and the subsequent advice of the expert...without more, did not materially advance the lawsuit": para 30, especially as the other party had never been notified of the retention of the expert, let alone served with his report. Furthermore, Hughes, J ruled that, "the retaining of an expert, after the date the expert report was to have been served by Matco, was an act, in my view, that satisfied a prior commitment," and therefore did not restart the clock: para 32.

[16] Similarly, in ***Barath v Schloss***, 2015 ABQB 332, a party failed to serve an expert report on the other side until long after it had been prepared. Lee, J ruled that the preparation did not amount to a significant advance, as "without the shared knowledge of the expert report, the parties could not make any decisions with respect to its conclusions.... 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": para 10. A party therefore may not rely on an export report, that has not been previously disclosed, in defence of a drop dead application. This would not be in keeping with the *Alberta Rules*. In my view, the

2017 ABQB 636 (CanLII)

report must be disclosed to advance the primary litigation, not to prove a "significant advance" in drop dead proceedings.

[17] In ***1406998 Alberta Ltd v Dorbandt***, 2017 ABQB 321, a party had served an "expert report" that read as an opinion that did not specifically quantify the alleged loss. Master Schlosser rejected that this report was a significant advance: "the question is then: 'Is this report of any significant assistance in determining any of the issues in the Pleadings?' In my view it is not.... It does not advance this action because it does not discharge the primary burden of proving the extent [of the loss]": para 29.

[18] In ***Nash,*** Topolniski, J, at paragraph 47, considered when a settlement offer could constitute a significant advance. "[T]he settlement offer... [does not] effectively reset the clock on delay. I agree that a significant advancement towards resolution can mean advancement to settlement. However, a functional analysis mandates something more than a bare offer to settle in the three year window; it must result in progress of some sort in the action.... The result might have been different if the settlement discussion resulted in a narrowing of the issues or other agreement that streamlined the trial or other process on the resolution continuum."

Appellant's Position

[19] Mr. Barlot argued that any of (1) his counsel's letter on January 15, 2014, confirming the scheduling of examinations, (2) the subsequent provision of expert reports to Mr. Barlot on February 28 and 8 August, 2014, or (3) the October 2014 offer to settle, constituted the last significant advances. Any of these would render the respondent's filing of the motion on November 23, 2016, premature. Further, Mr. Barlot argued that the November 2013 consent order to the litigation plan in some measure was an agreement to delay, as acquiring expert reports would take time, and so the period between the consent order and preparation of the reports should be considered as waived by the respondent.

Respondent's Position

[20] The respondents' argument is simple: that the last significant advance was the consent order of November 21, 2013, and this Order in no way amounted to an agreement to delay. Furthermore, the respondents suggest that the consent order might not even constitute a significant advance, as no substantive advance in the litigation was achieved by it.

Discussion

[21] The January, 2014 letter indicating compliance with the consent order is not a significant advance in itself. At best, it indicates a tentative satisfaction of the prior commitment to schedule expert reports: ***Matco***, para 32. The expert reports themselves also do not constitute significant advances. There is nothing on the record to indicate they were ever served on the defendant, as was required by clause 3 of the consent order. Even if they had been provided, they may likewise only have served to satisfy the commitment made under the consent order, thus not constituting a separate advance.

[22] Even absent the service requirement of the consent order, it is unlikely that these reports could be seen to have advanced the action, as they were not deployed in any manner towards resolution or trial proceedings.

[23] Finally, the offer to settle contains no factual or legal details. It is a "bald offer" and is in no way constructive towards advancing the action.

2017 ABQB 636 (CanLII)

[24] It is true that Rule 4.32 allows for parties to agree to a period of delay. However, both parties must be served with that agreement, setting out the nature and extent of the delay consented to. In the case of ***Young v A. Dei-Baning Professional Corporation***, 1996 ABCA 213, the Alberta Court of Appeal held that while a consent order and request for case management did amount to a waiver of delay that had occurred up to that moment, they absolutely were not an agreement to further delay. The Court ruled instead that, "any delay on the part of the respondent occurring after the implementation of that process warranted special consideration and censure": para 15.

[25] The Court of Appeal also ruled in ***Flock v Flock Estate***, 2017 ABCA 67, leave to appeal to SCC refused, 37552 (19 October 2017), that any agreement to delay must be express. In that case, the appellant had engaged in conduct, including suggesting that the litigation be "put on hold" in contemplation of mediation, agreeing to adjourn the setting of trial dates and working towards implementing a litigation plan, which the chambers judge found to have lulled the respondent into believing that time limits would not be enforced. Schutz, JA, for the Court reversed this ruling, holding at paragraph 22 that, "silence is not acquiescence, and acquiescence does not amount to an "express" standstill agreement. Plaintiffs cannot be "lulled" into inactivity by vagueness about the reach of this mandatory rule." And at paragraph 24 that, "there is no duty upon an applying party to expressly advise a responding party that it does not acquiesce to delay: the rule imports no such duty."

[26] The test in rule 4.33 is not whether an action advances the litigation, but whether it *significantly* does. I conclude that the consent order of November 21, 2013, did not amount to an agreement to delay, and, being a court order, was the last potentially significant advancement in this litigation. In the result, I would deny the appeal and confirm that the action should be dismissed under rule 4.33.

Section 4.31

[27] The *Alberta Rules* speak to another concern relating to delay. Rule 4.31(1) states that if delay occurs in an action, the Court may dismiss the claim if it determines that the delay has resulted in significant prejudice. The more significant the prejudice caused, the less inordinate the delay must be. The Court acknowledged this in ***Humphreys v Trebilcock,*** 2017 ABCA 116, at para 123, when they suggest that tolerance for delay should be lower for more prejudicial allegations such as fraud. "[A]ny delay may not escape being characterized as inordinate delay if the non-moving party advances a fraud claim."

[28] Rule 4.31(2) states that if the Court finds that the delay is inordinate and inexcusable, that delay will be presumed to have caused significant prejudice. The focus in subsection (2) is on the nature of the delay. Delay that is both inordinate and inexcusable will lead to a rebuttable presumption of prejudice.

[29] The Court of Appeal in ***Trebilcock*** defined delay.

> "Delay is a relative concept" It is the product of a comparison between the point on the litigation spectrum that the non-moving party has advanced an action as of a certain time and that point a reasonable litigant acting in a reasonably diligent manner and taking into account the nature of the action and stipulated timelines in the rules of court would have reached in the same time frame. One measures progress in a specific action and compares it against the progress made by the

2017 ABQB 636 (CanLII)

> comparator - the reasonable litigant advancing the same claim under comparable conditions: para 115.

[30] The Court held that to constitute delay under subsection (1) that delay should be inordinate in comparison with the delay which might ordinarily reasonably occur in the course of the litigation.

[31] The Court then turned to defining “significant prejudice.” They first analysed “significant.”

> "Significant", in the context of a procedural court rule focusing on delay, means prejudice that is more than minor or trivial. It must be important enough to justify the attachment of a serious consequence adverse to the interests of the non-moving party. Webster's Third New International Dictionary offers this potential meaning: "deserving to be considered: important, weighty, notable". The Oxford English Dictionary states that significant may mean "[i]mportant, notable": para 128.

[32] Prejudice can take two forms. Litigation prejudice relates to the conduct of the litigation. Particularly, it relates to erosion of the evidentiary record. Documents are lost, witnesses’ memory fades. The courts also recognize the possible non-litigation prejudice that a litigant can suffer. These are the various collateral consequences of being involved in prolonged and uncertain litigation, including effects on personal health, reputation and business interests. In criminal law delay jurisprudence this is known as the “security interest”: ***R v Rahey***, [1987] 1 SCR 588 at 647.

[33] Rule 4.31 is a discretionary rule aimed at allowing a judge to comprehensively assess the litigation as a whole to establish whether it should continue, regardless of what procedural milestones have been met to keep the case alive.

[34] The respondents rely on both subsections of the rule. They say that there has been inexcusable delay throughout the case since 2007, save for a recent period in 2016-2017, which Mr. Barlot attributed to some health concerns. The respondents also say that they have suffered prejudice as a result of this delay. For example, Nigel Seddon, employee and former owner of Cardinal Contacts, one of the co-defendants, filed an affidavit outlining the litigation prejudice they had suffered. He raises four points: (1) the company is under new ownership, (2) relevant witnesses have left the company, (3) manufacturing processes have since changed, making it unlikely that witnesses could speak confidently to the process followed in preparing the contact lenses, and (4) all documentation pertaining to the lenses, and their production for Mr. Barlot twelve years ago, has since been destroyed.

[35] In general, Mr. Barlot argues that any delay on his behalf was not the result of bad faith, and is excusable. He has been battling a variety of ailments. Meanwhile, he had to change counsel at several moments of the litigation, and the handovers of the file do not appear to have gone smoothly.

[36] Even if I were to hold that delay on the part of Mr. Barlot was excusable due to issues with counsel and his health, this is the tenth year of this litigation, and twelfth since the alleged tort occurred. Because key documents and witnesses are gone or have moved on, I accept the defendant’s evidence of significant litigation prejudice caused by the delay, meaning I would alternatively dismiss the appeal, and Mr. Barlot’s claim, under rule 4.31(1).

2017 ABQB 636 (CanLII)

Rationale for the Delay

[37] As stated above, Mr. Barlot argued that he had no intention of causing delay; much of it was the result of a change of counsel as well as his own lengthy illness in 2016. The record does indicate that there was some turbulence in his legal representation that certainly could have caused delay, and he did provide the defendants with various doctor's letters as to his illness throughout 2016 and into 2017. Further, Mr. Barlot, and indeed his former counsel, seem to have been under the erroneous impression that a previous counsel had indeed served the expert reports on the defendants.

[38] Mr. Barlot also alleges bad faith on the part of defence counsel for proceeding with this application despite his repeated requests for adjournments to allow his health to recover and to retain new counsel.

[39] As referenced above, Rule 4.1 states that parties "are responsible for managing their dispute and for planning its resolution in a timely and cost effective way." The courts do not usually become involved in this process unless asked, and certainly should not become so at the late stage of deciding a drop dead application. If Mr. Barlot was concerned about delay accumulating due to his poor health or difficulties retaining counsel, it was his or his counsel's responsibility, not the respondents' or the court's, to know the rules and manage this risk through applying for the assistance. For example, Mr. Barlot could have made use of rule 4.7(2), which allows a Court on application to "adjust or set dates by which a stage or step in the action is expected to be complete," or rule 4.10, which allows parties to hold a case conference to manage the litigation.

[40] But rule 4.33 operates as a mandatory limitations period. A Court has no discretion to allow exceptions to it: ***Wilson (Next Friend of) v Aspen View Regional School, Division No 19***, 2014 ABQB 741 at para 23. If the defendants had instead brought the application primarily in relation to rule 4.31, Mr. Barlot may have been able to show that the delay was not "inexcusable"; however, even then the defendant could have shown that the delay, excusable or not, caused significant prejudice to their interests.

[41] Regardless of the above, the record shows that Mr. Barlot's requests for adjournments to retain new counsel and to allow his health to improve occurred after the delay application was brought. At that point the delay had already crystallized. While it is possible that Mr. Barlot's claim has merit, court resources are a scarce public good and must be distributed early in the process.

Conclusion

[42] Delay in the justice system is a serious problem throughout Canada. Finding court time is an especially serious problem in Alberta, a jurisdiction plagued by notorious institutional delays: ***R v Vader***, 2016 ABQB 55 at para 94, ***R v Lam***, 2016 ABQB 489, paras 113-116. The Supreme Court of Canada in ***R v Jordan,*** 2016 SCC 27, on the criminal side, and ***Hryniak v Mauldin,*** 2014 SCC 7, relative to civil matters, has called for a cultural shift in the legal profession and judiciary towards resolution-focussed proceedings to combat delay. As the Alberta Court of Appeal explained in ***Trebilcock*** at paragraph 90,

> ...People understandably expect that the mechanisms our state has constructed for the resolution of disputes will process them at a reasonable rate and not allow

2017 ABQB 636 (CanLII)

> stale actions to survive. When these legitimate expectations are not met, individuals most closely linked to actions and the greater community may lose confidence and respect for the manner in which justice is administered. Litigation delay is a corrosive force in a free and democratic state committed to the rule of law.

[43] Although Canadians have a constitutional right to access the courts, our Court of Appeal has stated that, "[o]ne of the implicit conditions attached to the right...is that the plaintiff not abuse the judicial process and infringe the rights of others," which occurs when a disproportionate share of publicly funded court resources are allocated to one individual: ***Trebilcock*** at para 98.

[44] Appearances on the matter under appeal are numerous, so far having been made on April 8, 9, 14, and 15, 2009; August 25, 2010; November 19, 30, and December 3, 2012; November 21, 2013; and now February 10, May 11 and July 28 2017, when this appeal was again adjourned until September 15. The vast majority of these resulted in adjournments or relate to enforcing litigation plans. I do not suggest that these appearances are all at the feet of Mr. Barlot, and I do sympathise with his health problems, but I do suggest that he or his counsel have had a fair opportunity to use court resources over the last ten years. The suit has meanwhile moved no closer to resolution.

[45] In the result, I dismiss Jean Barlot's appeal and confirm the order of Master Farrington.

Heard on the 15th day of September, 2017.
Dated at the City of Calgary, Alberta this 27th day of October, 2017.

W.A. Tilleman
J.C.Q.B.A.

Appearances:

Jean Barlot
Self-represented
for the Appellant

Bruce J. MacLeod
Scott Venturo Rudakoff LLP
for Dr. Haskel Eisner and H. Eisner Professional Corporation

Erika Carrasco
Field LLP
for Cardinal Contact Lens Inc.

2017 ABQB 636 (CanLII)