In the Court of Appeal of Alberta

Citation: Droog v Hamilton, 2025 ABCA 228

Date: 20250623
Docket: 2401-0140AC
Registry: Calgary

Between:

Thomas Droog, T & E Ventures Inc., and 1554670 Alberta Ltd.

Appellants

- and -

Myles Hamilton and 1437183 Alberta Ltd.

Respondents

The Court:

The Honourable Justice Michelle Crighton
The Honourable Justice Anne Kirker
The Honourable Justice William T. de Wit

Reasons for Decision

Appeal from the Order of
The Honourable Justice C.M. Jones
Dated the 26th day of April, 2024
Filed the 14th day of August, 2024
(2024 ABKB 243; Docket: 1701-13214)

Reasons for Decision

The Court:

[1] This is an appeal of a decision by a chambers judge to dismiss an appeal from the decision of an applications judge dismissing the appellants' action against the respondents for long delay under rule 4.33(2) of the *Alberta Rules of Court*, Alta Reg 124/2010.

[2] It is uncontroversial that by May 22, 2021, three years had passed without a significant advance in the action. May 22, 2021, fell on the Saturday of a long weekend. On Tuesday, May 25, 2021, the appellants delivered a defectively commissioned affidavit of records listing twelve documents to counsel for the respondents by email. The same day, the respondents filed and served their application for an order dismissing the appellants' action for long delay. The application was scheduled to be heard on July 13, 2021, but was adjourned at the appellants' request to September 24, 2021. The application was adjourned again on September 24, 2021, after the appellants sought to have the matter heard in special chambers. At the time of the second adjournment, the court granted a consent order negotiated between the parties that contemplated the respondents amending their application and that set procedural deadlines. The respondents subsequently filed their Amended Notice of Application seeking summary dismissal of the action in the alternative to dismissal for long delay. The appellants raised no issue at the time that proceeding this way was inconsistent with the foundational rules or that it would allow them to assume the respondents had waived the delay and rely on the exception to mandatory dismissal in rule 4.33(2)(b): see *Flock v Flock Estate*, 2017 ABCA 67 at para 10, leave to appeal to SCC refused, 37552 (19 October 2017).

[3] Before the applications judge, the appellants resisted dismissal of their action under rule 4.33 on the basis that section 22(2) of the *Interpretation Act*, RSA 2000, c I-8, extended the three-year long delay period such that their email service of an affidavit of records on May 25, 2021, should be treated as a significant advance in the action that fell within, not beyond, the time period of inactivity that would otherwise mandate the dismissal of the action. The applications judge disagreed that s. 22(2) of the *Interpretation Act* assisted the appellants. He found the three-year period contemplated by rule 4.33 had expired without a significant advance in the action and he therefore dismissed the action for long delay.

[4] The chambers judge agreed with the applications judge and rejected the additional argument advanced by the appellants (for the first time) that by seeking summary dismissal as an alternative to dismissal of the action for long delay, the respondents had participated in the action after the period of delay in a way that justified the action continuing pursuant to rule 4.33(2)(b). The chambers judge noted that the concurrent scheduling of the "fallback" application was intended to make efficient use of time and court resources.

[5] The appellants now argue that the chambers judge erred in finding that:

(a) the affidavit of records emailed on May 25, 2021, was not effectively served within three years of the last significant advance in the action; and
(b) the respondents' summary dismissal application did not justify the action continuing under rule 4.33(2)(b).

[6] Whether s. 22(2) of the *Interpretation Act* applies to extend the three-year period under rule 4.33 engages issues of statutory interpretation that are reviewable for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 at para 8.

[7] Subject to the two exceptions under rules 4.33(2)(a) and (b), the dismissal for long delay rule is written in absolute terms. The dismissal of an action is mandatory if three years or more have passed without a significant advance in the action: *Danis-Sim v Sim*, 2024 ABCA 297 at para 18, citing *Flock* at paras 17 and 27; *Morasch v Alberta*, 2000 ABCA 24 at para 5; and the *Interpretation Act*, RSA 2000, c I-8, sections 28(1)(m) and 28(2)(d). To calculate time under rule 4.33, it must "be measured *from* a date and so must be measured from the last significant advance: *Rahmani v 959630 Alberta Ltd*, 2021 ABCA 110 at para 16, citing *Trout Lake Store Inc v Canadian Imperial Bank of Commerce*, 2003 ABCA 259 at paras 25-33; *Barath v Schloss*, 2015 ABQB 332 at para 9. Measuring the time this way, it cannot be disputed that three years without a significant advance in the appellants' action passed on May 22, 2021. There is nothing in the words of rule 4.33 to suggest the three-year long delay period may be extended if the last day falls on a weekend.

[8] The appellants argue that s. 22(2) of the *Interpretation Act* applies to extend the time within which they could advance their action by serving an affidavit of records because Saturday, May 22, 2021, was the last day for them to do so and the respondents' counsel's office was closed. We disagree. First, as the respondents point out, the "3 years or more" period is only relevant on application by a *defendant* following the *absence* of a significant advance in the action. A plaintiff hoping to avoid dismissal for long delay has three years to make a significant advance, including by meeting the deadlines set out in other parts of the rules. In any event, we agree with the chambers judge that s. 22(2) does not assist the appellants in this case because nothing prevented them from serving their affidavit of records by email as they did, or by facsimile at the number provided by counsel for the respondents as part of their address for service, on or before Saturday, May 22, 2021: see Rules 11.20, 11.21 and 11.3. Reading the words of s. 22(2) of the *Interpretation Act* in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the *Act*, the chambers judge correctly concluded that the section only applies on a Saturday when an enactment requires that an "instrument or thing" be "registered, filed or done" by or on that day, at an office or place, and that "instrument or thing" cannot be "registered, filed or done" because the office or place is not open. That was not the situation here. The appellants' affidavit of records was served after the three-year period of delay.

[9] This brings us to the appellants' second ground of appeal. "Whether "in the opinion of the Court" a continuation of the action is warranted involves an element of discretion. "Appellate intervention is not appropriate absent an error of principle or an unreasonable exercise of the discretion": *CWC Well Services Corp v Option Industries Inc*, 2019 ABCA 331 at para 11. The chambers judge determined that in the circumstances of this case, the foundational goal of the rules was best served by refusing to allow the action to continue. His decision was reasonable on this record.

[10] The appeal is dismissed.

Appeal heard on June 12, 2025

Memorandum filed at Calgary, Alberta
this 23rd day of June, 2025

Authorized to sign for: Crighton J.A.

Kirker J.A.

de Wit J.A.

Appearances:

J.W. Moroz
for the Appellants

D.R. McKinnon
A.N. Steele
for the Respondents