In the Court of Appeal of Alberta

Citation: Morrison v. Galvanic Applied Sciences Inc., 2019 ABCA 207

Date: 20190524
Docket: 1801-0010-AC
Registry: Calgary

Between:

Robert J. Morrison, Valarie Koziol, as Litigation Representative for the Estate of James Frederick (Rick) Durst and David S. Pullan

Appellants
(Applicants)

- and -

Galvanic Applied Sciences Inc.

Respondent
(Respondent)

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Myra Bielby
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice C.L. Kenny
Dated the 6th day of December, 2017
Filed on the 12th day of January, 2018
(Docket: 1301 11717)

Memorandum of Judgment

The Court:

[1] Master Robertson dismissed the appellants' case[1] on account of delay under rr. 4.31 and 4.33 of the *Alberta Rules of Court*.[2]

[2] The Court of Queen's Bench saw it the same way as the original court.

[3] We agree that the appellants' dilatory prosecution of their claim constitutes "inordinate and inexcusable delay" and caused the respondent "significant prejudice" under r. 4.31 and resulted in the passage of more than three years without a "significant advance" in the action under r. 4.33(2).

[4] The appellants, minority shareholders in Galvanic Applied Sciences Inc., were dissatisfied with an offer they had received to sell their shares in that company.[3] They applied on October 17, 2013, under s. 191 of the *Business Corporations Act*,[4] for an order determining the fair value of their shares.[5] Their originating application was not accompanied by a supporting affidavit. It stated that it would "come later". The application was set to be argued December 9, 2013.

[5] On December 2, 2013 Robert J. Morrison received approximately $2 million as an advance payment toward the value of the common shares he held in the company.[6] The other appellants were paid $412, 250.[7]

[6] A week later, with the consent of the parties, the Court adjourned the appellants' originating application *sine die*. The appellants had not filed a supporting affidavit.

[7] Almost three years after the appellants filed their originating application – October 13, 2016 – Mr. Morrison filed an affidavit.[8] The admissible parts collected the relevant documents related to the Galvanic en bloc share purchase, most of which were publicly available on SEDAR.[9]

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[1] *Morrison v. Galvanic Applies Sciences Inc.*, 2017 ABQB 514, ¶¶ 35 & 56.

[2] Alta. Reg. 124/2010.

[3] Appellants' Extracts of Key Evidence A111, A113 & A114.

[4] R.S.A. 2000, c. B-9.

[5] Appeal Record P1.

[6] Appellants' Extracts of Key Evidence A10 & A457. See *Business Corporations Act*, R.S.A. 2000, c. B-9, ss. 191(7) & 191(12)(c).

[7] Id.

[8] Id. A4.

[8] On April 10, 2017 the respondent applied for an order dismissing the appellants' action for delay under rr. 4.31 and 4.33.

[9] This Court has emphasized the harm litigation delay causes:[10]

> Litigation delay harms those who are directly and indirectly involved in an action tainted by inaction, the civil justice system as a whole and the greater community. Litigation is a form of stress that has the potential to make those directly and indirectly affected unhappy – litigation is expensive, introduces uncertainty … – and may diminish the productivity of the persons affected by the unresolved dispute. 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 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.

Rules 4.31 and 4.33 take dead aim at stalled actions.

[10] Rule 4.31 authorizes a court to dismiss an action that features inordinate and inexcusable delay and significantly prejudices the moving party.

[11] To determine whether inordinate delay is present an adjudicator compares "the point on the litigation spectrum that the nonmoving 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".[11]

[12] If the inquiry discloses a discrepancy between the two points, the court must determine whether the "differential between the norm and the actual progress of an action is so large as to be unreasonable or unjustifiable".[12] Delay of this magnitude is "inordinate".

[13] A characterization of delay as "inordinate" triggers the next query. Has the nonmoving party accounted for the delay and does the explanation justify the pedestrian pace at which the action has been prosecuted?

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[9] This is an acronym – System for Electronic Document Analysis and Retrieval. It gives the public access to most public securities documents and instruments filed by issuers with provincial and territorial regulatory authorities.

[10] *Humphreys v. Trebilcock*, 2017 ABCA 116, ¶ 90; [2017] 7 W.W.R. 343, 368-69.

[11] Id. at ¶ 115; [2017] 7 W.W.R. at 377-78.

[12] Id. at ¶ 120; [2017] 7 W.W.R. at 381.

[14] If the adjudicator concludes that the delay is both inordinate and inexcusable, the rebuttable presumption recorded in r. 4.31(2) comes into play: "Where ... 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."

[15] It is the burden of the nonmoving party to demonstrate on a balance of probabilities that the delay has not caused the moving party significant prejudice.[13]

[16] We are satisfied that, as of the date of the respondent's application, the comparator litigant would have filed his affidavits, completed questioning on them, retained experts, delivered expert reports and secured a hearing date.[14]

[17] The appellants' progress of this action is so far behind the comparator's that we have no doubt whatsoever that the "differential between the norm and the actual progress … is so large as to be unreasonable or unjustifiable", the test for inordinate delay.

[18] Mr. Morrison has provided an explanation for his delay:[15]

> Although I had engaged in the writing of affidavits on a few occasions prior to this action, it was always with the benefit and guidance of counsel. The Morrison Affidavit was the first affidavit that I have ever written as a self-represented litigant. The subject matter was extensive, highly challenging, and complicated. During the course of the action until the filing of the Morrison Affidavit I worked on my computer on the overwhelming majority of days.

[19] Mr. Morrison, in effect, states that the delay is attributable to the fact that he is not a lawyer and did not know what information should be in his affidavit.

[20] This explanation does not justify the delay.

[21] In the case of the typical self-represented litigant, as a general rule, explanations that do nothing more than seek forgiveness for dilatory prosecution of an action because a party has no or limited legal training and failed to advance an action in accordance with court rules are unacceptable.[16]

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[13] Id. at ¶ 149; [2017] 7 W.W.R. at 391-92.

[14] See *Deer Creek Energy Ltd. v. Paulson & Co., Inc.*, 2008 ABQB 326; 49 B.L.R. 4th 1 (fair-value proceedings were completed in less than 2.5 years).

[15] Appellants' Extracts of Key Evidence A440.

[16] *Alberta Rules of Court*, r. 1.1(2) ("These rules also govern all persons who come to the Court for resolution of a claim, whether the person is a self-represented litigant or is represented by a lawyer") & Canadian Judicial Council,

[22] But Mr. Morrison is not the typical self-represented litigant.

[23] He is a sophisticated businessman and investor.[17] He is familiar with the applicable jurisprudence.[18]

[24] Mr. Morrison has not stated that he could not afford to retain counsel. He understood the importance of doing so. His affidavit discloses that he did seek legal advice from various sources.[19]

[25] Mr. Morrison knew the significance of the delay rules.[20] He was obviously well aware that he did not have the legal training needed to advance this complex action. He knew that he did not have the qualifications to provide expert opinions on the methods of valuing corporate shares.[21]

[26] When considering whether to grant indulgences to a self-represented litigant, the court must always ensure that the procedures are fair for both parties. There can be no suggestion that a court would have tolerated the pace of this litigation if it was being managed by a lawyer, but will not apply the same standard to a self-represented litigant. Clear noncompliance with mandatory provisions of the *Alberta Rules of Court* by a self-represented party cannot simply be overlooked, especially in the face of prejudice to the other side.

[27] While we understand the challenges facing self-represented parties, the bottom line is that all litigants are expected to comply with the *Alberta Rules of Court*.

[28] Our conclusion that Mr. Morrison has advanced his action in such a dilatory manner that it can be characterized as "inordinate delay" and that his explanation for his tardiness cannot be justified allows the respondent to take advantage of the r. 4.31(2) presumption of significant prejudice.

[29] Mr. Morrison has not discharged his burden of demonstrating that his delay has not caused the respondent significant prejudice.

[30] Litigation prejudice is always a concern with the passage of a substantial period of time – now more than five years here. Memories degrade. Papers are lost. Witnesses die. This is not a straight-forward documents case; Mr. Morrison alleges in his affidavit that Galvanic's chief

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Statement of Principles on Self-Represented Litigants and Accused Persons 9 (2006) ("Self-represented persons are expected to familiarize themselves with the relevant legal practices and procedures pertaining to their case").

[17] Appellants' Extracts of Key Evidence A9, ¶¶ 12 & 13.

[18] Id. A31, ¶ 21, A40, ¶ 32, A51, ¶ 49, A77, ¶ 96 & A82, ¶ 106.

[19] Id. A10, ¶ 20 & A440, ¶ 12.

[20] Id. A442-43, ¶¶ 17-20.

[21] Id. A36 & A37, ¶¶ 27 & 28.

executive officer's decision to sell her shares for $1.70 "was a shocking betrayal of … [her] fiduciary duty to Galvanic shareholders" and placed her "in a severe conflict-of-interest".[22]

[31] There is also nonlitigation prejudice to consider. As Lord Denning observed in *Biss v. Lambeth Southwark and Lewisham Area Health Authority*,[23] "[t]here comes a time when … [a business] is entitled to have some peace of mind and to regard the incident as closed". Taking into account the appellants' allegations of misconduct, that time has arrived in this case.

[32] There is no reason for the court to exercise its discretion in the appellants' favor and allow them to continue with their action.

[33] The appeal judge did not err in concluding that the appellants' delay has resulted in significant prejudice to the respondent and dismissing the appellants' action.

[34] Rule 4.33(2) directs a court to dismiss an action that has not made a "significant advance" in a period of three or more years.

[35] A significant advance exists if the nonmoving party in the applicable timeframe has done something that increased by a measurable degree the likelihood that either the parties or the court would have sufficient information to rationally asses the merits of the parties' positions and be in a better positon to either settle or adjudicate the action.[24] Has the nonmoving party done something that "narrow[ed] the issues, complete[d]the discovery of documents and information, or clarif[ied] the positions of the parties"?[25]

[36] The appellants did not significantly advance the action in the applicable timeframe.

[37] Most of the SEDAR information contained in Mr. Morrison's October 13, 2016 affidavit should have been stated in the appellants' originating application. Rule 3.8(1) of the *Alberta Rules of Court* states that an "originating application must … state the claim and the basis for it". As well, the key facts that Mr. Morrison records in his affidavit were either known to the respondent or were contained in public documents and were readily available to the respondent. The affidavit does not increase the likelihood that a court will be in a better position to resolve the dispute or that the parties will be in a better position to settle it. It does not narrow the issues.

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[22] Appellants' Extracts of Key Evidence A58 & A61.

[23] [1978] 1 W.L.R. 382, 389 (C.A. 1977).

[24] *Weaver v. Cherniawsky*, 2016 ABCA 152, ¶ 26; 38 Alta. L.R. 6th 39, 46 ("For a step to significantly advance an action it must move the parties closer to resolution") & *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 28; 400 D.L.R. 4th 512, 524 ("A significant advance does not have to be so definitive that it would support an application for summary judgment").

[25] *Ro-Dar Contracting Ltd. v. Verbeek Sand & Gravel Inc.*, 2016 ABCA 123, ¶ 20; 400 D.L.R. 4th 512, 521.

[38] Had the appellants filed an expert opinion stating that the en bloc sale process was flawed and why they well may have met the r. 4.33(2) standard.

[39] The Court of Queen's Bench committed no reversible error in concluding that the appellants' action must be dismissed under r. 4.33(2).

[40] The appeal is dismissed.

Appeal heard on May 8, 2019

Memorandum filed at Calgary, Alberta
this 24th day of May, 2019

Slatter J.A.

Bielby J.A.

Wakeling J.A.

Appearances:

R.M. Phillips
for the Appellants

D.V Tupper/A.G. Manasterski
for the Respondent