COURT OF APPEAL FOR ONTARIO

CITATION: Southwestern Sales Corporation Limited v. Spurr Bros. Ltd., 2016 ONCA 590
DATE: 20160726
DOCKET: C61458

Hoy A.C.J.O., Brown and Huscroft JJ.A.

BETWEEN

Southwestern Sales Corporation Limited

Plaintiff (Appellant)

and

Spurr Bros. Ltd., Spurr (Contracting) Inc., Donald Kelly Spurr, Mary Spurr and John Randall Koop

Defendants (Respondents)

James Cooke, for the appellant

Gino Morga, for the respondents

Heard: July 18, 2016

On appeal from the order of Justice Pamela L. Hebner of the Superior Court of Justice dated November 9, 2015, with reasons reported at 2015 ONSC 6908.

Brown J.A.:

Overview

[1] The appellant, Southwestern Sales Corporation Limited, appeals the dismissal of its motion to set aside the order made at a status hearing dismissing seven actions it brought under the *Construction Lien Act*, R.S.O. 1990, c. C.30 – six lien actions and one breach of trust action.

[2] The thorough reasons of the motion judge give a detailed chronology of the litigation, so reference need only be made to several key points. The appellant supplies aggregate building materials in the Windsor area. In December 2000, the appellant registered six claims for lien against properties owned by the respondents. To obtain an order vacating the claims for lien, the respondents paid into court approximately $330,000. In January 2001, the appellant commenced six lien actions on its lien claims. In January 2003, the appellant filed its trial record. However, it then commenced the breach of trust action. Periods of activity were followed by long periods of inactivity. Status hearings were scheduled, only to be adjourned by the appellant or to have the appellant fail to meet the deadlines set. The trial was set for September 2009, but did not proceed. In 2012, the actions were struck from the trial list. More status hearings were scheduled, only to be adjourned at the appellant's request. Throughout, the appellant was represented by counsel.

[3] Eventually a status hearing was scheduled for October 6, 2014, peremptory to the appellant. No one appeared for the appellant; the actions were dismissed by Master Pope. It transpired that counsel for the appellant had surrendered his licence to the Law Society of Upper Canada about two months before the October 2014 status hearing.

[4] The respondents then secured payment of the monies out of court. When the respondents sought to garnish the appellant's bank account to satisfy unpaid

cost orders, that galvanized the appellant and it sprang into action. It retained new counsel, and there is no dispute new counsel moved expeditiously to set aside the dismissal order of Master Pope. The motion judge dismissed the appellant's motion.

[5] The appellant advances three grounds of appeal, submitting the motion judge: (i) applied the wrong test; (ii) erred in failing to accept the appellant's explanation for its delay; and (iii) erred in finding the respondents had suffered prejudice.

Standard of Review

[6] A decision to dismiss an action for delay at a status hearing is discretionary and entitled to deference on appeal unless the decision was made on an erroneous legal principle or is infected by a palpable and overriding error of fact: *1196158 Ontario Inc. v. 6274013 Canada Ltd*., 2012 ONCA 544, 112 O.R. (3d) 67, at para. 16.

First ground of appeal: The motion judge applied the wrong legal test

[7] The appellant submits the motion judge applied the wrong legal test for a motion to set aside a dismissal order made at a status hearing pursuant to rule 48.14(7) of the *Rules of Civil Procedure* and this error warrants the intervention of this court. According to the appellant, instead of applying the two-part test described in *Faris v. Eftimovski*, 2013 ONCA 360, 206 O.A.C. 264, at para. 32

(the "*Faris* test"),[1] the motion judge wrongly applied the four-part test in *Reid v. Dow Corning Corp.* (2001), 11 C.P.C. (5th) 80, [2001] O.J. No. 2365 (S.C. [Master]), at para. 41 (the "*Reid* test")[2] used when considering a motion to set aside a registrar's dismissal of an action under rule 48.14(1).

[8] I do not agree. Although the motion judge did not purport to rely on the *Faris* test line of cases, in my view, her reasons disclose her analysis focused on and applied the correct legal principles.

[9] The timeliness of adjudication is one measure of the health of a justice system. In respect of the criminal justice system, the Supreme Court of Canada has stressed the need to change a "culture of delay and complacency towards it": *R. v. Jordan*, 2016 SCC 27, at para. 29. The same can be said of the Ontario civil justice system.

[10] The *Rules of Civil Procedure* contain general and specific provisions to create a culture of timely civil justice. At the general level, rule 1.04(1) requires courts to construe the rules "to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits." At the specific level, rule 48.14 establishes a presumptive timeframe for the listing of a civil action for trial which, if not met, requires the plaintiff to show cause why the

[1] As applied in *Khan v. Sun Life Assurance Co. of Canada*, 2011 ONCA 650, 1 C.C.L.I. (5th) 183, at para. 1; and *1196158 Ontario Inc*., at para. 32.
[2] As applied in *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Ltd*., 2007 ONCA 695,87 O.R. (3d) 660, at para. 12; *MDM Plastics Ltd. v. Vincor International Inc.*, 2015 ONCA 28, 124 O.R. (3d) 420, at para. 11.

action should not be dismissed. Rule 48.14 provides the court with a tool by which to assume an active role in controlling the pace of litigation: *Faris*, at para. 29; *1196158 Ontario*, at para. 34.

[11] The presumptive time period for listing a civil action for trial contained in rule 48.14(1) reminds plaintiffs of their obligation to move their actions forward expeditiously to their resolution or final determination on the merits and cautions that they bear the consequences of conducting their actions in a dilatory manner: *Faris*, at para. 33.

[12] The *Faris* and *Reid* tests describe what a dilatory plaintiff must demonstrate to a court to restore a dismissed action: the *Reid* test deals with administrative dismissal orders made by registrars; the *Faris* test concerns dismissal orders made at status hearings.

[13] Under the *Faris* test, a plaintiff seeking to set aside a dismissal order made at a status hearing must demonstrate two things: (i) there was an acceptable explanation for its delay and (ii) if the action were allowed to proceed, the defendant will suffer no non-compensable prejudice. The analysis of the motion judge addressed both these matters; she did not fail to apply the proper legal principles.

Second ground of appeal: The appellant explained its delay

[14] At the hearing, the appellant focused its submissions on how the motion judge treated its explanation for the 13-year delay. The explanation proffered by the appellant was that it was misled by its counsel, Mr. Istl, about the progress of the action and was not told that a status hearing was scheduled for October, 2014. The appellant submits the motion judge erred in concluding it had not provided a reasonable explanation for its delay.

[15] I do not accept this submission.

[16] The motion judge undertook her analysis in the context of actions brought by a commercial plaintiff under the *Construction Lien Act*. I agree with her description of the characteristics of construction lien claims set out at para. 19 of her reasons:

> A lien claim can be an onerous thing for a defendant. A defendant is faced with the prospect of either having its land tied up as a result of the registration of a claim for lien or, alternatively, having to finance sometimes substantial payments into court in order to free up title to the land. Similarly, a breach of trust claim can also be an onerous thing for defendants. They are faced with the possibility of being personally responsible for a corporate debt. For these reasons, it seems to me that a lengthy delay in a claim for lien case (and a breach of trust case) constitutes prejudice to the defendants of the kind described above. If the lien claimant wants to take advantage of the provisions of the Construction Lien Act and tie up title to a defendant's property, it ought to proceed expeditiously to have its claim determined. Similarly, if a lien claimant wants to take

> advantage of the trust provisions of the Construction Lien Act it ought to be prepared to proceed expeditiously to have its claim determined. A lien claimant ought not to be entitled to sit back and allow years to pass while the defendant's property (or, as in this case, the defendant's money) is held hostage.

[17] At the time of the status hearing, the former two year period for listing an action for trial was in force. This court has described that time period as a "relatively generous one," providing "ample time to complete remaining steps" following the filing of the first statement of defence: *1196158 Ontario*, at paras. 36 and 39. Yet, the appellant's delay far exceeded the presumptive time period in rule 48.14. After more than 13 years, the appellant's actions had not gone to trial, yet the respondent's funds remained tied up in court. As Blair J.A. noted in *Kara v. Arnold*, 2014 ONCA 871, 328 O.A.C. 382, at para. 17, it is a common sense observation that "the longer the delay, the more cogent the explanation must be."

[18] The appellant did not file cogent evidence on its motion to set aside. The brief affidavits from the appellant's controller consisted, in large part, of three assertions: (i) the appellant did not know about the status hearing; (ii) its former counsel represented the respondents were delaying the actions or the matter was progressing or it would soon settle; and (iii) it did not know its counsel had surrendered his licence.

[19] The motion judge considered the appellant's affidavits, but found they did not amount to an adequate explanation for the delay because they raised more questions than they answered. She stated, at para. 12:

> The plaintiff's evidence is that Mr. Istl did not keep it informed as to the progress of the action. Mr. Istl did not advise the plaintiff that he was failing to move the matter along. Mr. Istl misled the plaintiff as to the status of its action. I have no doubt that all of this is true. What the plaintiff did not address in its evidence is how often the plaintiff contacted Mr. Istl to inquire as to the progress of the action. When years had passed without any substantive steps being taken towards a resolution, why did the plaintiff not investigate and demand that steps be taken? Why did the plaintiff not retain another counsel to move the action forward? There was no evidence offered to answer these questions.

[20] The appellant submits that it was an error for the motion judge to accept the appellant had been misled by its lawyer about the status of the actions, but then conclude the appellant had failed to provide an adequate explanation for the delay.

[21] I disagree. The appellant is a commercial entity. In 2001, it commenced construction lien actions that resulted in the respondents paying a substantial sum of money into court. As the party that commenced the actions, the appellant bore primary responsibility for their progress. Retaining a lawyer to represent it in the actions did not lessen that obligation.

[22] As part of its obligation to move its construction lien actions along, the appellant was required to take reasonable steps to supervise its counsel's work to ensure there would be an expeditious determination of the actions on their merits. On a motion to set aside a dismissal order, one would expect a commercial plaintiff like the appellant to file concrete evidence describing the steps it had taken to supervise its counsel's handling of its actions. The appellant did not do so. Given the absence of such evidence, it is understandable the motion judge was not prepared to accept that the assertions of the appellant's controller amounted to an acceptable explanation for a 13-year delay.

[23] Accordingly, I agree with the motion judge's conclusion that the appellant failed to provide an acceptable explanation for its delay.

Third ground of appeal: Prejudice to the respondents

[24] The *Faris* test is a conjunctive one – the appellant must meet both of its elements. Since I agree with the conclusion of the motion judge that the appellant failed to demonstrate an acceptable explanation for its delay, it is not necessary to deal with the issue of prejudice.

Disposition

[25] For the reasons set out above, I agree with the motion judge's decision to dismiss the appellant's motion seeking to set aside the order dismissing its actions. I would dismiss the appeal and award the respondents their costs of the

appeal fixed at $13,500, inclusive of HST and disbursements, as agreed by the parties at the hearing of the appeal.

Released: “AH” (July 26, 2016)

“David Brown J.A.”
“I agree Alexandra Hoy A.C.J.O.”
I agree Grant Huscroft J.A.”