Court of Queen's Bench of Alberta

Citation: Van Fossen v Edmonton (City), 2017 ABQB 503

Date: 20170816
Docket: 0703 03193
Registry: Edmonton

Between:

Sharen Van Fossen

Plaintiff (Respondent)

- and -

The City of Edmonton and Raymond Verstraete

Defendants (Applicant)

Reasons for Decision
of
L.A. Smart, Master in Chambers

I. Introduction

[1] The Defendants, The City of Edmonton and Raymond Verstraete (collectively the "City") are applying for dismissal of this action pursuant to r 4.33 and r 4.31 of the *Alberta Rules of Court*. The action by the Plaintiff Sharen Van Fossen ("Van Fossen") arises out of personal injuries from a collision between her vehicle and a City of Edmonton Transit Bus on March 10, 2005. The driver of the Transit Bus, Raymond Verstraete, passed away on February 8, 2006 from causes unrelated to the accident. The Statement of Claim was issued on May 9, 2007 and served on the City on March 5, 2008.

[2] Thereafter some discussions took place between Plaintiff's counsel and the City with a view to resolving the matter. On February 23 and August 17, 2006, Plaintiff's counsel forwarded medical documentation such as notes and charts of physicians, the hospital and Statement of Benefits Paid.

[3] On August 1, 2012 the City filed an application to dismiss for long delay pursuant to r 4.33 having erroneously concluded that five years had passed since service of the Statement of Claim. An Order for dismissal was granted on September 4, 2012 but set aside by consent on September 19, 2012 upon recognition of the error. On February 25, 2013, Plaintiff's counsel demanded that a Statement of Defence be filed, which the City did on March 1, 2013.

[4] On December 15, 2014, the City received correspondence from counsel for the Plaintiff indicating that the file would be transferred to Weir Bowen LLP and on February 11, 2015 a Notice of Change of Representation was received.

[5] On February 29, 2016 the City received a letter from counsel for Van Fossen attaching a copy of her Affidavit of Records sworn February 28, 2016. On March 1, 2016, the City filed and served its application for dismissal for long delay on counsel for Van Fossen. Later that day the City received copies of Van Fossen's producible records under Schedule 1 of her Affidavit of Records.

[6] Since the accident in this case, Van Fossen has been involved in three further accidents: first, as a passenger on an Edmonton transit bus on September 10, 2008; second, arising from a slip and fall on September 10, 2008; and third, another motor vehicle accident on August 14, 2009. Finally of note is that liability in relation to this matter remains in dispute.

II. Rule 4.31

[7] This rule 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
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> (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.

[8] In determining if delay is inordinate, it is necessary to examine the entire progress of the action from its start to the date an application is made. It is now 12 years since the accident and 10 years since the Statement of Claim was issued. Nothing happened to advance the action for five years until the Statement of Defence was demanded and thereafter filed by the City. Another three years less a day went by before the Affidavit of Records was served. Although one must be cautious not to minimize the impacts upon those injured in motor vehicle accidents, there is nothing to suggest there are complexities here that would take this action outside the "run of the mill" motor vehicle personal injury claim. Nor can it be said that there were any significant impediments even in light of the later accidents that have prevented Van Fossen from actively pursuing this litigation. I have no difficulty concluding there has been delay and that it has been inordinate.

[9] Next it is necessary to consider if the delay in the circumstances is excusable. It may be the issues with respect to damages in particular have been complicated by the later accidents but no evidence of the nature of the injuries and their connection to those in this action has been provided. Other than being made aware of later injuries and actions nothing is provided to explain how those claims are progressing. It is argued that there have been significant efforts made to advance this action since the current law firm was retained. The affidavit filed November 15, 2016 in opposition to these applications contains copies of six letters sent in 2015

to five physicians/clinics that have treated the Plaintiff, a Statement of Benefits Paid from Alberta Health Care covering February 1, 2007 to January 27, 2015 and the charts provided in response to those letters. Although the letters ask for complete charts none reference the injuries from this accident but rather to later accidents and injuries. In any event these records were sent to the City and had not previously been provided to the City. Having made these efforts to obtain records is argued to have excused the delay.

[10] A closer examination of what has been done and what has been collected is necessary. It is noteworthy that what was provided was treatment charts only. Charts from two of the physicians and one clinic cover the period from before and after this accident. The remaining charts specifically relate to later accidents and injuries. Even on a cursory review, it is readily apparent that no attempt has been made to include only relevant and material records but rather it is simply a dump of the records received. Again, notable is the lack of records demonstrating consultation with experts to obtain opinions crucial to resolution of this action and the others, never mind the actual preparation of any experts' reports. In my view, the efforts made are insufficient to support a conclusion that the delay ought to be excused.

[11] The final aspect to consider is whether there has been prejudice. The Defendant Verstraete passed away in 2006. This cannot be said to be prejudice attributed to delay but as a consequence the only witnesses to the accident other than the Plaintiff are strangers to the incident per se and this litigation. The City argues that there will be difficulty locating these witnesses although no apparent efforts have been made to locate them. It is reasonable to infer that memories will have faded, indeed it is plain to me that the relative strangers who may have observed the accident twelve years ago will have limited recollection of the event. Questioning hasn't begun, experts must be retained by both the Plaintiff and the City and a trial is still a number of years away. This further passing of time will only serve to worsen the prejudice of delay. The rule presumes that having made the findings of inordinate and inexcusable delay that there has been significant prejudice. This presumption may be rebutted by evidence that raises a legitimate doubt that there has been significant prejudice. There is no such evidence here.

III. Rule 4.33

[12] Based on the wording of this rule and its judicial interpretation at the time, this action was given new life by the filing of the Statement of Defence on March 1, 2013. The next thing done by Van Fossen was to serve an Affidavit of Records on February 29, 2016. Authorities (e.g. ***Nash v Snow***, 2014 ABQB 355) are now clear that simply performing a mandatory task under the *Rules* does not automatically satisfy the requirement for a significant advance. The Court must adopt a functional approach and complete a qualitative assessment considering such factors as the nature, quality and timing of what has occurred. The Affidavit of Records describes relevant medical records beyond the timeframe of the documents provided to the City by previous counsel. On its face it is arguable that the preparation and service of the Affidavit of Records may be sufficient to establish that the action has been significantly advanced. The nature quality and timing relative to the qualitative assessment of the advances made by the Plaintiff have been discussed above and do not require repeating here. Having said this I am mindful that it is the activities during the last three years that are most relevant to the consideration and assessment of compliance under this rule. No exceptions to compliance under the rule have been argued nor are there any factual circumstances that might give rise to such arguments.

IV. Decision

[13] Having regard to the above discussion on the activities of the Plaintiff over the last three years, I conclude that qualitatively the late filed Affidavit of Records, and the efforts made to obtain those records, are not sufficient to have significantly advanced the action. Accordingly, I would grant the Application and dismiss this action pursuant to r 4.33. Furthermore, I conclude that r 4.31 is engaged and I would dismiss the action thereunder if it were necessary. The City shall have its costs of the action.

Dated at the City of Edmonton, Alberta this 16th day of August, 2017.

L.A. Smart
M.C.Q.B.A.

Appearances:

Philip G. Kirman
Weir Bowen LLP
for the Plaintiff (Respondent)

Carly Williams
City of Edmonton Law Branch
for the Defendants (Applicant)